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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 233

RICE BROS., a partnership consisting of Charles R. Rice, Wm. J. Downey and John J. Donohue,
Petitioner,

vs.

E. H. BIRMINGHAM,
Respondent.

Petition for writ of certiorari to the Supreme Court of the State of Iowa, and brief in support thereof.

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IN THE

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OCTOBER TERM, A. D. 1947.

No.

RICE BROS., a partnership consisting of Charles R. Rice, Wm. J. Downey and John J. Donohue,
Petitioner,

vs.

E. H. BIRMINGHAM,
Respondent.

Petition for writ of certiorari to the Supreme Court of the State of Iowa, and brief in support thereof.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Rice Bros., a partnership consisting of Charles R. Rice, Wm. J. Downey, and John J. Donohue, prays that a writ of certiorari issue to review the judgment of the Supreme Court in and for the state of Iowa entered and rendered against petitioner by that court on the 11th day of February, 1947 (R. 44-60, incl., 140, 141), which judgment became final by the overruling of petitioner's petition for rehearing on the 9th day of May, 1947 (R. 138, 139), by which final judgment the judgment of the District Court in and for Woodbury County, Iowa, rendered in favor of petitioner and against respondent was reversed with direction that final judgment be rendered by the District Court of Woodbury County, Iowa, against petitioner and in favor of respondent (R. 44, 54, 55, 140, 141). The issuance of

the writ of procedendo has been stayed by order of the Supreme Court of the state of Iowa to give this petitioner an opportunity to present to this court a certified copy of the record of proceedings in the Supreme Court of Iowa with its petition and supporting brief for writ of certiorari (R. 141).

STATUTES RELIED UPON TO SUSTAIN THIS COURT'S JURISDICTION AND PETITIONER'S RIGHT TO HAVE WRIT OF CERTIORARI GRANTED.

Petitioner relies upon the provisions of Section 237 of the Judicial Code, 28 U.S.C.A., Sec. 344, and particularly paragraph (b) thereof, to have writ of certiorari granted, and to sustain the jurisdiction of this court.

OTHER FEDERAL STATUTES INVOLVED.

This case presents highly important federal questions not heretofore decided by this court. These questions arise out of the provisions of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C.A., Sections 201-217, inclusive; these questions arising particularly from the construction, effect, and enforcement given this Act by the decisions of this court and other federal tribunals.

SUMMARY AND SHORT STATEMENT OF THE CASE.

THE PARTIES INVOLVED.

Petitioner is a partnership composed of Charles R. Rice, Wm. J. Downey, and John J. Donohue (R. 4); it is registered with and licensed by the Secretary of Agriculture to carry on the business of a market agency under the Packers and Stockyards Act both at the public stock yards at Sioux

City, Iowa, and Sioux Falls, South Dakota, which stock yards are posted and regulated yards as defined by said Act (R. 29, 30). Petitioner is engaged in receiving and selling livestock on commission, as well as purchasing livestock on commission.

Respondent is a livestock dealer at the Sioux City yards (R. 11); he has been engaged in buying and selling livestock, and especially cattle, for about fifteen years (R. 13, 14).

NATURE OF THE CASE.

Respondent sued petitioner in conversion for the value of fifteen head of cattle which it, as a market agency, received and sold for the account of a party giving the name of John Brainman, and to whom respondent promptly accounted for the net proceeds (R. 4-6, incl., 31-33, incl.). Respondent bases his right to recover upon the theory that the check which respondent received from Brainman in payment of the cattle in question later proved to be worthless; that the title to the cattle in question never passed to Brainman; and that the petitioner, having acted as the agent of Brainman, was liable in conversion (R. 4-6, incl.).

THE MATERIAL FACTS.

The facts are all undisputed. On June 6, 1945, the respondent and his employes at the Sioux City Stock Yards met for the first time a party representing himself to be John Brainman (R. 11, 12, 17, 20, 21, 23, 27).

Respondent and his employes exhibited for sale to the said John Brainman the fifteen head of cattle in question (R. 12, 20, 27). Negotiations for the sale started about 9:00 o'clock A.M. and ended by completion of the sale about 10:00 o'clock A.M. on said June 6, 1945 (R. 27).

After these negotiations of sale were completed (R. 20), respondent's employes procured and delivered to the said Brainman a pass and a health certificate to complete delivery and to permit the said Brainman to remove from the Sioux City Stock Yards the cattle in question (R. 21-28 incl.). Respondent accepted in payment of the cattle a check prepared by respondent's employes and signed by Brainman on a Sioux Falls bank without calling that bank by 'phone or otherwise to ascertain whether the check was good or would be paid upon presentation (R. 17, 27); respondent relying upon his own judgment of the man, believing it to be good (R. 18). Respondent further testified that he accepted the check knowing that Brainman was going to remove the cattle, and that he consented to the delivery and removal, believing the purchase price of the cattle to have been paid (R. 17).

Neither respondent nor his employes required of Brainman any identification or made any investigation as to the truth of his statements and representations (R. 17, 20, 21, 23, 27). The name "John Brainman" was fictitious. There was no person by the name of "John Brainman" (R. 12). The party's real name was "Jack Cotton" (R. 13).

After the cattle were delivered to the fictitious Brainman, and after he received the indicia of ownership—the pass and health certificate—he employed a trucker by the name of Michael to transport the cattle from Sioux City to Sioux Falls, where they were delivered to petitioner as a market agency for sale (R. 28, 29). The cattle were sold by petitioner as a market agency to a party by the name of Snyder (R. 13, 18). Petitioner, having no knowledge of respondent's claimed rights, immediately delivered the proceeds to the said Brainman.

Two or three days after respondent made the sale to Brainman and accepted Brainman's check, the check was

returned dishonored (R. 12). Respondent did not immediately notify petitioner of respondent's claimed rights because he knew petitioner had already remitted the proceeds to Brainman (R. 18, 19).

It is without dispute that petitioner acted honestly and in good faith and without knowledge of the respondent's claimed or asserted rights, or any fact that would place petitioner upon inquiry.

PETITIONER'S POSITION.

Petitioner's position in the State courts was and still is that:

1. By the Packers and Stockyards Act of 1921, petitioner's status was changed from that of a private agency to that of a public utility.

2. As such public utility, petitioner, having no knowledge of respondent's claimed rights, and there being nothing to place petitioner upon inquiry, was required to promptly serve fictitious Brainman.

3. Under the Federal law, petitioner, as such public utility, and having no knowledge or fact to place it upon inquiry, was required to promptly receive, promptly sell, and promptly account to the shipper and consignor, Brainman, for the proceeds arising from the sale in question.

4. Petitioner, having acted honestly and in good faith and without knowledge of respondent's claimed rights, and being compelled as a national public utility to serve all comers in the absence of any fact jusifying it to refuse its services, cannot be held liable to respondent for damages in the transaction of which complaint is made.

5. Respondent, having made a bona fide sale of the cattle in question to fictitious Brainman, and having delivered possession as well as indicia of ownership to fictitious Brainman, is now estopped from mak-

ing claim against petitioner and all other innocent persons.

6. Under the old equitable maxim, where, when one of two innocent persons must suffer by the act of a third, he, by whose acts or negligence it happens, must be the sufferer, the respondent was not and is not entitled to recover from petitioner.

(R. 7-11, incl.)

THE JUDGMENT OF THE DISTRICT COURT OF WOODBURY COUNTY, IOWA.

At the close of the plaintiff's evidence petitioner rested without introducing any evidence. Both sides then moved for a directed verdict and the District Court sustained petitioner's motion (R. 33-38, incl.). Judgment was accordingly rendered in favor of petitioner (R. 145, 146).

THE JUDGMENT OF THE SUPREME COURT OF IOWA.

The Supreme Court of Iowa, by a court divided five to four, reversed the judgment of the trial court (R. 44-60, incl.) with directions that the trial court sustain respondent's motion for a directed verdict, and that final judgment be rendered accordingly against petitioner (R. 54, 55, 140). The opinion of the Supreme Court of Iowa, having not yet been officially reported, appears in 26 N. W. (2d) 39, and in the record at pages 44 to 60, inclusive.

Upon rehearing, the majority of the Supreme Court of Iowa denied petitioner's petition on the condition that there be deleted from the original opinion certain statements and conclusions (R. 138, 139).

The majority of the Iowa Supreme Court reversed the judgment in favor of petitioner because, in their opinion, petitioner, being the agent of fictitious Brainman, was

chargeable with his knowledge; that because Brainman's acts were unlawful and he was liable in conversion, petitioner's acts were likewise unlawful and it was liable in conversion; that there was no provision in the Packers and Stockyards Act expressly granting petitioner immunity; and that petitioner was not even entitled to the same rights, privileges, and defenses as Snyder, who purchased the cattle at the Sioux Falls Yard, for the reason that petitioner was acting as Brainman's agent. This must necessarily be true even after the deletion upon rehearing of certain parts of the original opinion, for otherwise there are no grounds stated by the majority for the reversal (R. 44-55, incl.; 138, 139; 26 N.W. (2d), 39 to 46, incl.).

The minority of the Supreme Court of Iowa, in the dissenting opinion written by Justice Smith, held in substance that:

1. The Packers and Stockyards Act converted livestock commission merchants, market agencies, from the status of public utilities to that of national public utilities.

2. Market agencies should not be held to be converted by the Act into public utilities required to serve without discrimination and still be held personally responsible for the honesty and good faith of the customers they are required to serve.

3. A market agency cannot exact from one customer a showing as to title and right that it does not exact from all others. Otherwise it would risk incurring liability to the prospective customer against whom it thus discriminated.

4. Any general rule or practice of requiring everyone to show title or right of disposition of property offered for sale would impede and obstruct the flow which the Act seeks to make free and unburdened.

5. Petitioner, a public utility, required to render its services without discrimination, having no notice

of respondent's claimed rights and there being nothing to place it upon inquiry, should not be held liable.

6. Where such public utility had knowledge of a defect in title or facts to place it upon inquiry, such immunity or protection would not exist.

(R. 55-60, incl.; 26 N.W. (2d) 39.)

QUESTIONS PRESENTED.

I.

EXEMPTION OR IMMUNITY FROM LIABILITY QUESTIONS.

1. Can a market agency, converted by federal law into a national public utility and thus required to render its services in the sale of livestock to all comers, be held liable in conversion for performing the duties and responsibilities thus imposed upon it where, at the time of rendering its services, it had no knowledge that the title of its customer was defective, and had no fact to place it upon inquiry that such title was defective, and which honestly and in good faith rendered the services thus required?

2. Can the Packers and Stockyards Act be construed as it has been construed by this court and the other federal tribunals so as to convert petitioner and all other market agencies from the status of a private agency to that of a public utility, thus imposing upon petitioner and all other market agencies all the burdens, duties, regulations, and responsibilities of a public utility and yet allow state courts to deny to petitioner and all other market agencies the benefits, privileges, and immunities enjoyed by all other public utilities since we have been a nation?

3. Can the Federal Government compel petitioner and all other market agencies when such market agencies have no knowledge that a shipper's title to livestock is in any way defective, and when they have no knowledge of any facts to place them upon inquiry, to promptly receive and promptly sell all livestock consigned to them for sale, and thereafter to promptly account to the shipper for the proceeds; and then permit the state courts of any of the states to impose upon petitioner and all other market agencies the binding obligation of becoming the insurers of the title to the livestock which they are thus required to promptly receive and sell, as well as the guarantors of the honesty, integrity, and sincerity of the customers whom petitioner and all other market agencies are thus compelled to serve?

4. Should market agencies, national public utilities, required to serve the public under the regulations of the Federal Government, in some states of the Union be entitled to the exemptions, immunities, privileges, and benefits granted all public utilities for having innocently received and sold mortgaged or stolen property, and like market agencies, national public utilities, operating in the same manner in other states be denied such exemptions, immunities, privileges, and benefits and have imposed upon them the liability, obligation, and responsibility of becoming the insurers of the title to all livestock they are thus compelled to promptly receive and sell, as well as the guarantors of the honesty, sincerity, and integrity of the customers they are thus required to serve?

II.

DENIAL OF EQUAL PROTECTION OF THE LAW.

Did the Supreme Court of Iowa—by recognizing that all other public utilities such as common carriers and public warehousemen, compelled to serve all comers, are exempt from liability for handling mortgaged or stolen property on account of the compulsory nature of their services, but that petitioner, a national public utility, likewise required

to serve all comers, is not, under such facts, exempt and immune from liability, but, on the contrary, that petitioner's liability is the same liability as that of the customers it is required to serve, thus compelling petitioner to become the guarantor of the honesty, sincerity, and integrity of the different persons whom it is thus compelled to serve—deny to petitioner the equal protection of the law, in violation of the Federal Constitution, particularly the Fourteenth Amendment thereto?

III.

THE UNLAWFUL BURDENING OF INTERSTATE COMMERCE.

Does the judgment rendered by the majority of the Supreme Court of the State of Iowa impede and obstruct the flow of livestock from the producer through the centralized markets to the consumer, instead of making it free and unburdened (for which purpose the Packers and Stockyards Act was enacted), and thereby unlawfully burden interstate commerce in violation of the commerce clause of the Federal Constitution?

IV.

DENIAL OF DUE PROCESS OF LAW.

It being settled beyond peradventure that respondent by his acts of selling the cattle in question to fictitious Brainman and by accepting in payment thereof fictitious Brainman's check, without investigating Brainman or the validity of the check, and by delivering possession of the cattle in question to Brainman with full indicia of title and ownership, estopped himself from making claim of ownership to said cattle from an innocent purchaser thereof, did the majority of the Supreme Court of Iowa, by holding that such defense of estoppel was not available to petitioner (a market agency and a federal public utility, which, without knowledge of respondent's claimed rights or any facts to place petitioner upon inquiry, performed its duties as a public utility by promptly receiving, promptly selling, and promptly accounting to fictitious Brainman

for the proceeds), take petitioner's property without due process of law?

The above constitutional questions did not exist until after the opinion of the majority was rendered by the Supreme Court of Iowa. They were then immediately raised by petitioner in its petition for rehearing (R. 106-112, incl.).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The four questions raised under Division I of this petition, entitled "Questions Presented," are questions as to what exemptions and immunities were granted market agencies when they were converted by the Packers and Stockyards Act from the status of private agencies to that of Federal public utilities.

A decision of these questions is of great importance to all citizens engaged in the business of a market agency. This is necessarily true when considered in the light of the fact that the decision of the majority of the Supreme Court of Iowa, while recognizing that petitioner and all other market agencies were converted by the Act into national public utilities required to serve all comers, at the same time held they were the insurers of the title to all livestock they were compelled to receive and sell and the guarantors of the honesty, sincerity, character and integrity of all customers whom they were thus required to serve.

This holding becomes more startling when further considered with the fact that, in the year 1946, the value

of all cattle, calves, hogs, sheep and lambs in the United States, sold for slaughter and meat, was $6,868,000,000. (See page 3 of January, 1947, issue of the Farm Income Situation, Bureau of Agriculture Economics, U. S. Department of Agriculture.)

In view of these facts, these questions should be decided, determined and set at rest by a decision of this court. Market agencies should have these questions decided by this court for their future guidance and protection. They should now be informed and know whether their liabilities in the future are to be those prescribed by the opinion of the majority of the Supreme Court of Iowa or those prescribed by the decisions of our courts from the time memory of man runneth not to the contrary until the decision of the Supreme Court of Minnesota in the case of *Mason City Production Credit Ass'n* v. *Sig Ellingson & Co.*, 205 Minn. 537, 286 N. W. 713, rendered June 30, 1939. Certainly market agencies should have this question of law settled to enable them to determine whether they can continue with safety in the business of market agencies.

These questions present adequate and sufficient grounds for the granting of a writ of certiorari and to sustain the jurisdiction of this court for the following reasons:

(a) These questions involve Federal questions of substance not heretofore determined by this court.

(b) These questions have been decided by the majority opinion of the Supreme Court of Iowa in a way not in accord with the applicable decisions of this court.

(c) These questions involve petitioner's claimed rights, privileges and immunities under the Packers and Stockyards Act, the Constitution of the United States, and the prior decisions of this court.

(d) These questions present rights, privileges and immunities claimed by the petitioner under authority exercised by the Government of the United States.

II.

The three constitutional questions numbered II, III and IV present matters involving the denial by the Supreme Court of Iowa to petitioner of its constitutional rights and guaranties. Certainly under the undisputed facts in this case and the law as it has existed since we have been a Nation, the action of the Supreme Court of the State of Iowa entitles petitioner to have the writ of certiorari granted and the case fully reviewed by this court, and a determination had as to whether petitioner has or has not been deprived of its constitutional rights.

WHEREFORE, it is respectfully submitted that petitioner's prayer for a writ of certiorari to review said judgment of the Supreme Court of Iowa should be granted.

RICE BROTHERS,

By CLARENCE G. MYERS,
CHARLES F. SNERLY,
HERBERT BRACKNEY,
CHARLES STILWILL,
Its Attorneys.

BRIEF AND ARGUMENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

Reference is made to the foregoing petition for summary statement of the case, citation to opinions below, and statement as to jurisdiction.

II.

SPECIFICATIONS AND ASSIGNMENTS OF ERROR.

Petitioner adopts "Questions Presented" in the foregoing petition on pages 8 to 11, inclusive, as petitioner's specifications and assignments of error.

III.

SUMMARY OF ARGUMENT.

Petitioner adopts "Reasons Relied upon for the Allowance of the Writ" in the foregoing petition on pages 11 to 13 as its Summary of Argument.

IV.

ARGUMENT.

1.

THE PACKERS AND STOCKYARDS ACT CONVERTED LIVESTOCK COMMISSION MERCHANTS OR MARKET AGENCIES INTO NATIONAL PUBLIC UTILITIES, WITH THE SAME STATUS AS COMMON CARRIERS, PUBLIC WAREHOUSEMEN, OR OTHER BUSINESSES IMPRESSED WITH THE PUBLIC USE.

The Packers and Stockyards Act is found in Chapter 9, Title 7, U.S.C.A., Sections 181 to 231, inclusive, Sections 201 to 217, inclusive, being applicable to the questions under consideration.

The terms "stockyards services" and "market agency" are defined in Section 201 as follows:

> "(b) The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock.
>
> "(c) The term 'market agency' means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services." (Subsections b and c, Section 301 of Title III of the Act.)

Section 202 provides methods and procedure for the Secretary of Agriculture to designate regulated stockyards.

Section 203 requires the registration of all market agencies operating at such stockyards.

Section 204 requires the bonding of market agencies.

Section 205 provides that:

> "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard * * *."

Section 206 provides that:

> "All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful."

Section 207 requires market agencies to keep on file for public inspection schedules of their rates and charges, subject to the approval of the Secretary of Agriculture.

Section 208 prohibits and declares to be unlawful any unjust, unreasonable and discriminatory practices in respect to furnishing stockyard services.

Section 209 makes market agencies civilly liable to any person injured by their violations of the Act.

Sections 210 and 211 set out forms of procedure before the Secretary of Agriculture to enforce such liabilities. The remainder of the Act sets out further procedures for its enforcement.

This court, in the case of *Stafford* v. *Wallace,* 258 U.S. 495, 66 L. Ed. 735, in upholding the validity and constitutionality of the Act, definitely determined the *status* of a market agency to be that of a ***national public utility.*** In doing so, this court, speaking through Mr. Chief Justice Taft, on pages 514 and 516 of 258 U.S., and page 741 of 66 L. Ed., said:

> "The object to be secured by the act is the free and unburdened flow of live stock from the ranges and

farms of the West and Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products, to the consuming cities of the country in the Middle West and East, or, still as live stock to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

"The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carloads and trainload lots, *and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind.* The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character.

"The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, *not interfering with, but on the contrary, being indispensable to its continuity.* The origin of the live stock is in the West; its ultimate destination, known to, and intended by all, engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well understood course of business. *The stockyards and the sales are necessary factors in the middle of this current of commerce.*

"The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms

of the West to the consumers in the East." (Emphasis ours.)

In the case of *Wallowa National Bank* v. *Sevier Commission Co.*, 138 Ore. 393; 5 Pac. (2d) 100, at page 102, the Supreme Court of Oregon said:

> "We fully agree with counsel that the Packers and Stockyards Act of 1921 was largely copied from, where applicable, and is analogous to, the Inter-State Commerce Act. It is intended to do for the shipper of livestock to stockyards in the way of stockyard service, what the Inter-State Commerce Act (49 U.S.C.A., Sec. 1, *et seq.*) does for the shippers in the matter of transportation."

It is likewise settled law that, under the Act in question, the Secretary of Agriculture, subject to proper procedure regulating all administrative bodies, possesses the authority to fix and regulate the maximum commission rates chargeable by market agencies for the purchase and sale of livestock.

A. T. & S. F. R. R. Co. v. *United States,* 295 U.S. 193, at 201, 79 L. Ed. 1382 at 1389.

Tagg Bros. & Moorhead v. *United States,* 29 Fed. (2d) 750 at 752 and 753.

Tagg Bros. & Moorhead v. *United States,* 280 U.S. 420, at 435, 438, 439, 74 L. Ed. 524 at 532, 533.

Morgan, et al. v. *United States,* 298 U.S. 468, 80 L. Ed. 1288.

With equal certainty, the law has been determined to be that, since the enactment of the Act, market agencies can no longer choose their customers or refuse to deal with others engaged in the livestock business at the regulated markets.

Farmers Livestock Commission Co. v. *United States,* 50 Fed. (2d) 375 at 379.

United States of America v. *American Livestock Commission Company, et al.*, 279 U.S. 435, 73 L. Ed. 787.

In the case of the *United States* v. *Donahue Bros., Inc.*, 59 Fed. (2d) 1019, the court had before it the validity of an order of the Secretary of Agriculture requiring a market agency to keep funds derived from the sale of livestock in a trust account and not to commingle them with the market agency's individual funds. In upholding the validity of the Secretary's order, the Court of Appeals on page 1023, said:

> "• • • *The proper handling of shippers' funds and their proper transmission to the shipper is a part of defendant's duty in performing stockyard services. The sale of livestock contemplated by this act is not completed until all the services which the market agency is called upon to perform have been performed. That service is not complete until the agency has fully accounted to the shipper for the proceeds of the livestock sold. The regulation of any sale which disregards accounting to the shipper for the proceeds would be of doubtful value to the shipper.* • • •" (Emphasis ours.)

2.

A PUBLIC UTILITY MUST SERVE ALL APPLYING FOR ITS SERVICES WITHOUT DISCRIMINATION OR DELAY.

The difference between a private business and a public utility is clear and definite. One engaged in a private business can select those with whom he will deal and can determine the terms and conditions upon which he will deal. Public utilities, on the other hand, cannot refuse without a lawful excuse to serve anyone applying for their services. They must serve all alike; they must render their services

to anyone requesting them. This has been the law long and well settled.

In 51 C.J. 7, Sec. 16, the text writer clearly states the law upon this question, and says:

> "A public utility is obligated by the nature of its business to furnish its service or commodity to the general public, or that part of the public which it has undertaken to serve, without arbitrary discrimination, and it must, to the extent of its capacity, serve all who apply, on equal terms and without distinction, so far as they are in the same class and similarly situated. Accordingly, a utility must act toward all members of the public impartially, and treat all alike; and it cannot arbitrarily select or furnish its commodity, nor refuse to one a favor or privilege it has extended to another, since the term 'public utility' precludes the idea of service which is private in its nature and is not to be obtained by the public."

In the case of *People ex rel. Western Union Telegraph Co.* v. *Public Service Commission,* 230 N.Y. 95, 129 N.E. 220, the court, on page 221 of 129 N.E., said:

> *"It is well settled that all who deal with a public service corporation are to be treated alike and favor cannot be extended to one which is not offered to another; nor can a privilege given to one be refused to another."* (Emphasis ours.)

See also:

Highland Dairy Farms Co. v. *Helvetia Milk Condensing Co.,* 308 Ill. 294 at 300, 139 N.E. 418 at 421.

Inter-Ocean Publishing Co. v. *Associated Press,* 184 Ill. 438 at 448, 56 N.E. 822 at 824.

3.

SUMMARY AND ANALYSIS OF THE EFFECT OF THE ENACTMENT OF THE PACKERS AND STOCKYARDS ACT UPON PETITIONER AND ALL OTHER MARKET AGENCIES.

It is clear under the law that after the enactment and effective date of the Packers and Stockyards Act:

1. Petitioner's status was changed from that of a private agency to that of a national public utility.

2. Thereafter, petitioner, having no knowledge of any fact to justify its refusal to render its services, was required to promptly receive, sell, and account for the proceeds of all livestock consigned to it for sale.

3. By rules of the Secretary of Agriculture petitioner was compelled to keep funds arising from such sale separate from its own funds so that petitioner could promptly account to the shipper and consignor for livestock consigned to it for sale.

4. Petitioner can no longer select those to whom it will render its services or those to whom it will not render its services, but is required to render its services to all those who apply therefor unless petitioner has knowledge of facts which would permit it to lawfully refuse to render such services.

5. Petitioner, for its services and compensation can only charge and receive the rates and amounts approved by the Secretary of Agriculture.

6. Petitioner cannot exact from one customer a showing as to title or right which it does not exact from all of its customers, as its service must be rendered without discrimination.

4.

THE MARKED DISTINCTION BETWEEN THE TRANSACTIONS OF RESPONDENT WITH FICTITIOUS BRAINMAN AND THE TRANSACTIONS OF PETITIONER WITH FICTITIOUS BRAINMAN.

Respondent was an experienced, learned, and schooled dealer in cattle. He was under no obligation or duty legally or otherwise to deal with or sell his cattle to fictitious Brainman. Respondent was at liberty to sell his cattle to whom he pleased, when he pleased, and upon such terms and conditions as he pleased. In making the sale of the cattle to fictitious Brainman, respondent was under no regulations of any kind.

Respondent was free before consummating the sale and delivering possession and indicia of title and ownership to Brainman, to require payment either in cash, cashier's check, certified check, bill of exchange or otherwise, as a wise, prudent dealer would require from a stranger.

On the other hand, petitioner was a national public utility and, having no legal excuse to do otherwise, was required to promptly receive, promptly sell, and promptly account to fictitious Brainman for the proceeds. Petitioner could only charge for its services the rate of commission approved by the Secretary of Agriculture.

It is conceded that petitioner had no knowledge of respondent's claimed right or of any defect in the title of fictitious Brainman. Likewise, it is conceded that petitioner possessed no facts to place it upon inquiry.

Therefore, when respondent accepted a worthless check in payment in the exercise of his own judgment, upon which there were no legal restrictions, the question as to whether the check was good or bad was a hazard inherent in the business of respondent.

5.

UNDER THE LAW, LONG AND WELL SETTLED, IN THE JURISPRUDENCE OF THIS NATION, A PUBLIC UTILITY, REQUIRED BY LAW TO SERVE THE PUBLIC WITHOUT DISCRIMINATION, AND WHICH CANNOT CHOOSE ITS CUSTOMERS BUT MUST SERVE ALL COMERS AT APPROVED AND REGULATED RATES, CANNOT BE HELD LIABLE FOR HANDLING MORTGAGED OR STOLEN PROPERTY WHERE THE SERVICE RENDERED WAS DONE AT THE INSTANCE OF A PERSON IN POSSESSION, AND WHERE SUCH PUBLIC UTILITY HAD NO KNOWLEDGE OF THE RIGHTS OF SOME THIRD PERSON, OR ANY FACT OR FACTS TO PLACE IT UPON INQUIRY.

In the case of *Abernathy* v. *Wheeler,* 92 Ky. 320, 17 S.W. 858, 36 A.L.R. 593, at pages 858 and 859 of 17 S.W., it is said:

> "Wheeler, Mills & Co., mortgagees, etc., sued Abernathy & Long and C. S. Anderson, etc., for the price of said tobacco. It is admitted that Abernathy & Long received and sold said tobacco *as public warehousemen in the usual course of business and paid the proceeds of sale to C. S. Anderson, without actual notice of the existence of appellee's mortgage.* Are Abernathy & Long responsible for the sum for which the tobacco was sold? We think not. They were *public warehousemen,* for the purpose of receiving the tobacco of the producer, and selling it at public auction in consideration of receiving pay for storage and certain commission on the sales. They assumed the obligation of serving the entire public in the matter of receiving and selling the tobacco of the producer, and they had no right to select their customers and refuse others, provided they conformed to the reasonable rules and regulations of the house. See *Nash* v. *Page,* 80 Ky. 539. It is not contended that the warehousemen had any interest in the tobacco whatever; they

were only entitled to a commission *for making the sale and to be reimbursed for their other expenses and trouble in receiving and handling the tobacco. So, the question is, are they responsible to the mortgagees of the tobacco, as for a conversion of it?* That question seems to be settled in principle in *Newcomb* v. *Baskett*, 14 Bush. 658. It is there settled that a public warehouseman, receiving, storing and selling goods in his line of duty on commission, and having no property interest in the goods, and having no notice of an adverse claim on them, is not guilty of a conversion of them by the mere sale of them on account of the person that consigns them to his house for sale. In such case, the warehouseman asserts no interest in the goods or right to them hostile to the mortgagee or true owner; he simply acts as the custodian and mouthpiece of the apparent owner. No one would contend that had C. S. Anderson employed the appellants as auctioneers to sell the tobacco at auction on the streets of Hopkinsville, they receiving a compensation for their services only, and having no property right in the tobacco, they would have been liable to the appellees as for a conversion of the tobacco. Why? Because they asserted no right or interest hostile to the appellees but acted simply as the intermediaries, or indifferent parties, between the apparent owner of the tobacco and the bidders for it. *So here they act as public intermediaries in receiving and selling the tobacco, not having any interest therein, but for compensation merely; and when the tobacco is presented to them for public storage and sale by the apparent owner, in the usual way, and they, having no knowledge or information that others had an adverse interest in the tobacco, and there being no fact or circumstance attending the transaction that should put them, as persons of ordinary prudence, upon inquiry as to the rights of others in reference to the tobacco, it would not be in the interest of trade to require them to institute inquiry and investigation before sale as to true condition of the title of the tobacco.*" (Emphasis ours.)

Another leading case discussing the general principles on which defendant is relying is that of *Shellnut* v. *Central of Ga. Railroad,* 131 Ga. 404, 62 S. E. 294, wherein the Court on page 296 said:

> "It seems to be a well settled principle that a common carrier is guilty of no conversion 'though he receive property from one not rightfully entitled to possession, and, acting as a mere conduit, delivers it in pursuance of the bailment, if this is done before notice of the rights of the real owner. * * * *Common carriers by reason of the nature of their business, which imperatively requires them to receive and forward goods when tendered in the usual course of their business, have long formed an exception to the stringency of general rules in respect to what constitutes, in similar cases, a conversion.* The authorities on this point are abundant': (Citing cases) *'A common carrier must accept freight from every one offering the same, and is not guilty of conversion in accepting freight from a party in possession thereof,* unless the true owner intervenes before the goods are delivered and demands them.' " (Emphasis ours.)

Moore on Carriers, 2nd Ed., pages 283-284, states the law to be:

> *"A common carrier must accept freight from every one offering the same, and is not liable for conversion to the true owner in accepting freight from a party apparently rightfully in possession thereof,* unless the owner intervenes before the goods are delivered and demands them, and gives notice of his right to the property and his intention to enforce it, though the shipper had no right to possession in fact." (Emphasis ours.)

That such is the settled law appears without doubt. See:

> *Hall* v. *Cumberland Pipe Line Co.,* 193 Ky. 728, 237 S. W. 405, at 408;

Live Stock Commission Co. v. *C. M. and St. Paul R. R. Co.*, 87 Mo. App. 330, at 339;

Switzler v. *Northern Pac. Ry. Co.*, 45 Wash. 221, 88 Pac. 137, at 139;

Johnston v. *C. B. & Q. Ry. Co.*, 70 Neb. 364, 97 N. W. 479, at 482;

A. T. & S. F. R. R. Co. v. *International Land and Invest. Co.* (8th C. C. A.), 247 Fed. 265, at 267-68;

Fields, et al. v. *Blane, et al.*, (Ky.), 18 Ky. L. 675, 37 S. W. 850;

Nanson v. *Jacobs*, 93 Mo. 331, 3 Am. St. Rep. 531; 6 S. W. 246;

Dixon v. *So. Pac. Co.*, 42 Nev. 73, 172 Pac. 368, at 369-70; affirmed on rehearing, 177 Pac. 14, at 14-15;

Shellenberg v. *Fremont R. R. Co.*, 45 Neb. 487, 63 N. W. 859;

Gurley v. *Armstead*, 148 Mass. 267, 2 L. R. A. 80, 19 N. E. 389 at 390;

Thoms v. *D. C. Andrews & Co., Inc.*, 54 Fed. (2d) 250 at 252-253;

Kohn et al. v. *Richmond & D. R. Co.*, 37 S. C. 1, 16 S. E. 376;

Roanoke Banking Co. v. *J. E. Dunson Bros. & Co.*, 30 Ga. App. 341, 117 S. E. 826;

27 R. C. L., Sec. 61, page 1000.

9 American Jurisprudence, at 625.

The reason for this long and well settled rule is obvious. Were the rule to be otherwise, no one with safety could engage in the business of such a public utility in whose favor the rule has been evoked.

Common carriers, in whose favor the rule has been stringently enforced, receive the livestock at the point of

origin where such carriers maintain offices and agents, and are therefore in a position to conduct an investigation as to title. Still the law has always excused them from such an investigation on account of the compulsory nature of their services.

A market agency receives the livestock sometimes many hundreds of miles from the point of origin. It has no way, within a reasonable length of time, to check or investigate the title of the consignor.

As pointed out by Chief Justice Taft, in the case of *Stafford* v. *Wallace,* 258 U. S. 495, 66 L. Ed. 735, thousands of head of livestock arrive daily and must be promptly sold and disposed of, and moved out to give place to the constant flow of traffic that presses behind.

Common experience compels the court to take judicial knowledge of the fact that the facilities of a stock yard, including those of commission merchants or market agencies, are not such as would permit the holding of livestock for the purpose of making an investigation of title of the numerous shipments of cattle, calves, hogs, sheep, lambs and other livestock received daily. We repeat the observation of Chief Justice Taft that the livestock must be sold and promptly moved out of the stockyards to make way for the ensuing deliveries.

If a carrier receiving personal property at the point of origin, or a public warehouseman, is not required to investigate the title of the shipper or consignor and is not liable in conversion for dealing with the same unless it has actual knowledge of the rights of the other party, then surely a market agency, many miles distant from the point of origin, receiving the livestock under conditions that require its prompt receipt, sale and disposal, should not be required to investigate the title of the consignor in

possession. Certainly, such market agency should not be held liable in conversion if the title of the consignor is defective, unless such market agency has actual knowledge that the consignor's and shipper's title is defective.

One's eyes cannot be shut to the fact that, if the burden is placed upon livestock commission merchants, market agencies, and national public utilities to investigate and determine the title of all livestock consigned to them for sale, the cost of such investigation would be many times more than the amount they receive for their services in receiving, caring for, exhibiting for sale, selling, collecting and remitting the proceeds. The length of time such market agency could stay in business then would only depend upon the amount of assets it had at the beginning.

6.

PREVIOUS DECISIONS OF THE COURTS UPON THE QUESTION OF WHAT EXEMPTIONS WERE GRANTED MARKET AGENCIES WHEN THE PACKERS AND STOCKYARDS ACT CONVERTED MARKET AGENCIES FROM THE STATUS OF A PRIVATE AGENCY TO THAT OF A PUBLIC UTILITY.

This question was first raised in the case of *Mason City Production Credit Ass'n* v. *Sig Ellingson & Co.*, 205 Minn. 537, 286 N. W. 713.

In this case (hereinafter referred to as the "*Sig Ellingson* case") the Minnesota court recognized that the Act in question converted market agencies from the status of private agencies to that of national public utilities with respect to being regulated in regard to the rendering of their services and the charges they were entitled to make therefor. That court decided, however, that market agencies were not entitled to any benefits, privileges or exemptions by being thus converted and thus regulated.

That court recognized that common carriers, public utilities, were not liable in conversion for transporting stolen or mortgaged property unless they knew it was stolen or mortgaged. It held, however, that in these cases granting immunity to common carriers, common carriers were not liable because they did not undertake to deal with the title to the property.

The Minnesota court overlooked entirely the fact that the immunity granted common carriers and public warehousemen from the liability of ordinary agents in conversion suits was not granted because they did not deal with the title to the property; it was granted because of the compulsory nature of their services.

As pointed out by Justice Smith in his dissenting opinion in the case at bar, it is true that common carriers do not deal with the title, but common carriers very often do make impossible the recapture by the rightful owner of the property transported by them.

When livestock first starts in interstate commerce from the producer to the consumer, it is the common carrier that carries it often many hundreds of miles from the point of origin.

The Minnesota court entirely overlooked what was so forcibly pointed out by Chief Justice Taft in the case of *Stafford* v. *Wallace*, 258 U. S. 495, at 514 and 516; 66 L. Ed. 735, at 741, that the stock yards and the sales are necessary factors in the middle of this current of commerce; and that the commission man and market agency are essential in making the sales, without which the flow of the current would be obstructed. The commission merchants, market agencies, do not take title; they do nothing more than perform an essential and necessary service in this current of commerce.

If the true owner can follow livestock after the common carrier transports it many hundreds of miles from point of origin, he can likewise follow the livestock after another public utility does nothing more than perform a necessary service in this current of commerce. Since the market agency is a public utility, the compulsory nature of its services is the same as that of the common carrier. This current of commerce could not flow without the services of both.

The Minnesota court erroneously believed that, in order for market agencies, national public utilities, to be entitled to the same immunity as common carriers, the Act must so provide.

With reference to common carriers, there is no provision in any law for this exemption. It is an exemption and immunity recognized by the courts strictly and entirely on account of the compulsory nature of their services.

This court, in the *Sig Ellingson* case, denied a petition for a writ of certiorari (308 U.S. 599, 84 L. Ed. 501), and later, on November 22, 1939, denied a petition for rehearing (308 U.S. 637, 84 L. Ed. 529).

In denying this petition for a writ of certiorari, this court expressed no opinion upon the merits or demerits of the *Sig Ellingson* case or the questions now presented. In the case of *House* v. *Mayo,* 324 U.S. 42, 89 L. Ed. 739, this court, on pages 47 and 48 of 324 U.S., and page 743 of 89 L. Ed., said:

> "The district court also referred to a denial by this Court of a petition for certiorari, filed here after the denial by the Florida Supreme Court of one of the applications for habeas corpus. See *House* v. *Mayo,* 322 U.S. 710, 88 L. Ed. 1553, 64 S. Ct. 1058. The District Court thought that this was an expression 'of the

opinion that no meritorious question is presented by the matters of which petitioner here complains.' But as we have often said, a denial of certiorari by this Court imports no expression of opinion upon the merits of a case. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258, 60 L. Ed. 629, 633, 36 S. Ct. 269; *Ohio ex rel. Senev* v. *Swift & Co.*, 260 U.S. 146, 151, 67 L. Ed. 176, 179, 43 S. Ct. 22; *United States* v. *Carver*, 260 U.S. 482, 490, 67 L. Ed. 361, 364, 43 S. Ct. 181; *Atlantic Coast Line R. Co.* v. *Powe*, 283 U.S. 401, 403, 404, 75 L. Ed. 1142, 1143, 51 S. Ct. 498."

The same question was then pending before the Supreme Court of the State of South Dakota in the case of *First National Bank of Pipestone* v. *Siman, et al.*, 67 S. D. 118, 289 N. W. 416, which court, on December 30, 1939, followed the decision of the Minnesota court in the *Sig Ellingson* case because of the action of this court in denying a petition for a writ of certiorari as well as a petition for rehearing.

In the case of *Moderie* v. *Schmidt*, 6 Wash. (2d) 592, 108 Pac. (2d) 331, decided in 1940, the Supreme Court of Washington, without any independent or original discussion, adopted the principle announced by the Minnesota court in the *Sig Ellingson* case because of the action of this court in denying a petition for a writ of certiorari and a petition for rehearing, and because the Solicitor General of the United States appeared in opposition. (See page 334 of 108 Pac. (2d).

The question was next presented and decided by the Kansas City Court of Appeals of Missouri, in the case of *Blackwell* v. *Laird, et al.*, 236 Mo. App. 1217, 163 S. W. (2d) 91 (decided May 25, 1942). There the owner sought to recover from the commission firm the value of livestock

stolen from the plaintiff and sold by the defendant as a market agency.

The Missouri court, after considering the cases announcing the rule of the greater weight of authority that a public utility, required to render services to all applying therefor and having no lawful excuse to refuse its services, cannot be held liable in conversion, and after fully considering the *Sig Ellingson* case decided by the Minnesota Supreme Court, on page 94 of 163 S. W. (2d), said:

> "The Minnesota Supreme Court undertook to distinguish its holding from that of the Kentucky Court of Appeals decision, by saying: 'In the *Abernathy* case nothing is stated in the decision as to whether or not the chattel mortgage was properly filed.' However, upon a careful examination of the opinion, we find the Kentucky Court of Appeals said: 'Which mortgage was duly recorded, etc.' *However, we do not understand that the Kentucky Court founded its conclusion on that fact, but on the contrary, it bottomed its decision upon the proposition that the public warehouseman there 'had no right to select their customers and to refuse others.'* We recognize that the decision of the Minnesota court strongly supports appellant's contention and that the conclusions reached therein are persuasive but they are only persuasive and not binding on this court." (Emphasis ours.)

The Missouri court then concluded:

> *"We prefer to follow the line of decisions which hold in effect that a public utility which is required by law to render specific services to the public without discrimination, should not be considered in the same category with those who may or may not transport, store, or sell property at the request of one in possession thereof. In this case, the respondents performed the act which they were required to perform, to-wit: The selling of the cattle for a commission, and exercised no other dominion or control over the property other than that."* (Emphasis ours.)

To the same effect see:

Cresswell v. *Leftridge* (Mo. App. of St. L.) 194 S. W. (2d) 48.

Since then, to petitioner's knowledge, the question has been presented to the trial courts of two other states, namely: The District Court of Oklahoma and the District Court of Kansas. Both trial courts followed the rule announced by the *Blackwell* case and repudiated the rule announced by the *Sig Ellingson* case.

One of these cases—that of *Kent, et al* v. *Wright* (Okla.) —was appealed to the Supreme Court of Oklahoma. It was decided November 19, 1946 (175 Pac. (2d) 802).

The Oklahoma Supreme Court recognized the question and the conflict in the decision between the *Sig Ellingson* case and the *Blackwell* case, but did not pass upon that question, merely affirming a judgment in favor of the defendant market agency on other grounds.

We know of no other state adopting and following the *Sig Ellingson* case. In the case at bar, the District Court of Woodbury County, Iowa, refused to follow it. Four members of the Supreme Court of the State of Iowa refused to follow it, for the reasons announced in the dissenting opinion written by Justice Smith.

We respectfully submit that the decision of the Supreme Court of Minnesota in the *Sig Ellingson* case is predicated upon an erroneous conception of the cases cited to sustain it; that it is ill considered and does not follow the law as same had previously been announced by a long unbroken line of decisions. We submit that the dissenting opinion written by Justice Smith and rendered by a minority of the Supreme Court of Iowa, as well as the opinion in the *Blackwell* case, is sound, conforms to the long established principles of law, and has the added virtue of producing a result comporting with a non-technical sense of justice.

Market agencies, being national public utilities, should be governed by the same rule of law with reference to liability throughout the Nation. They should not be compelled to operate under one rule in one state and a different rule in another state.

7.

THE OPINION OF THE MAJORITY OF THE SUPREME COURT OF IOWA DENIES PETITIONER IMMUNITIES TO WHICH IT IS ENTITLED UNDER THE PACKERS AND STOCKYARDS ACT, AS AMENDED, BY BEING CONVERTED FROM A PRIVATE AGENCY TO A NATIONAL PUBLIC UTILITY.

Long before the Packers and Stockyards Act was enacted, the law regulating and determining the burdens, duties, responsibilities and liabilities of a public utility, as well as the law regulating the privileges, benefits and immunities granted public utilities on account of the compulsory nature of their services, had been determined by many decisions of the courts.

It is likewise true that long before the enactment of the Packers and Stockyards Act, the Congress had enacted many laws regulating the activities of common carriers.

Certainly, therefore, it cannot be successfully maintained that, at the time the Congress enacted the Packers and Stockyards Act, it did not know the burdens, duties, responsibilities and liabilities that it was imposing upon market agencies in converting such market agencies from private agencies to the status of national public utilities. It must necessarily, therefore, follow that the Congress well knew the rights, privileges, benefits and immunities it was granting market agencies by their conversion from the status of private agencies to the status of public utilities on account of the compulsory nature of their services.

The intent of Congress is a matter for consideration only where the words of an act are not clear or are ambiguous. This has been determined many times by the decisions of this court, and needs not the citation of authorities to substantiate it.

It has likewise been equally as well determined that, where the words of a Congressional enactment are clear, simple and unambiguous, the act must be construed within its four corners and that where language is plain and simple it needs no construction.

It, therefore, must be conceded that if it were the intent of the Act not to grant market agencies the benefits, privileges and immunities granted public utilities on account of the compulsory nature of their services, the Congress would have found adequate words to have expressed itself. Then, too, if it had expressly attempted to do so, there would have been the serious doubt, if not the fatal result, that it would have rendered the entire enactment unconstitutional.

Under the undisputed facts in the case at bar, the majority of the Supreme Court of Iowa were of the opinion that:

(a) Petitioner, by the Act in question, was converted into a national public utility, and thus had imposed upon it all the burdens, duties, responsibilities and liabilities of such a national public utility, but was entitled to none of the privileges, benefits and immunities granted such public utilities on account of the compulsory nature of their services;

(b) Petitioner, a national public utility, should be the insurer of its customers' title to all livestock which it was required to receive and sell;

(c) Petitioner should become the guarantor of the honesty, sincerity, and integrity of those to whom it was compelled to render its services;

(d) Petitioner was the insurer against loss of all

persons by reason of their own negligence, errors, and mistaken judgment, whether such persons be experienced speculators and livestock dealers, or financial institutions engaged in the loaning of money upon livestock; and

(e) Petitioner, a market agency, compelled to serve all applying for its services, should hold harmless the nation's citizenry from all errors, mistakes, and bad judgment exercised in the transaction of their own individual private business.

We submit that the opinion of the majority of the Supreme Court of Iowa denies to petitioner an immunity to which it is entitled under the Federal Act in question.

8.

THE OPINION OF THE MAJORITY OF THE SUPREME COURT OF IOWA DENIES TO PETITIONER THE EQUAL PROTECTION OF THE LAW GUARANTEED TO IT BY THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

It is settled beyond peradventure, and so recognized by the Supreme Court of Iowa, that common carriers, transporting mortgaged or stolen property, are not liable in conversion to the real owner or mortgagee, unless they have knowledge, before completing the transportation and making final delivery, that the property is stolen or mortgaged. This rule has been announced by the courts because of the compulsory nature of the services of such common carriers.

The majority of the Supreme Court of Iowa hold that market agencies are not entitled to such exemption and immunity. They place their exclusion and discrimination on the grounds that market agencies are the agents of the wrongdoer, and therefore charged with the wrongdoer's knowledge and with the wrongdoer's liability. The Supreme Court of Iowa entirely overlooks the fact that the

exemption granted such public utilities as common carriers was not based on the fact that the carrier did not deal with the title, but was based entirely upon the fact that the carrier, without a lawful excuse to justify its refusal to render its services, was compelled to render its services to all applying therefor.

The majority opinion of the Supreme Court of Iowa entirely overlooks the fact that petitioner was a like public utility; that it also was compelled to render its services in making sales unless it had knowledge of facts justifying its refusal to render such services. Furthermore, market agencies never claim title to, or exercise dominion of ownership over, livestock consigned to them for sale.

The majority opinion of the Supreme Court of Iowa entirely overlooks the fact that the sale of livestock at the centralized markets is a component part of the flow of this commerce, and that, without the sales, the flow of this interstate commerce could not be accomplished. It entirely overlooks the fact that the sales made at the centralized markets are as necessary in the flow of this commerce as the transportation from the ranch to the markets. It recognizes the immunity of the carriers; it denies this immunity to the market agencies.

It is submitted that to hold that the common carriers are exempt because of the compulsory nature of their services and to hold that market agencies whose services are as equally compulsory are not exempt, is to deny to market agencies the equal protection of the law as guaranteed by the Fourteenth Amendment to the Federal Constitution.

The case of *Chicago, Milwaukee, St. Paul and Pacific Ry. Co.* v. *Flanders,* 56 Fed. (2d) 114, is an identical case with the exception that the suit was against the common carrier instead of the market agency.

Flanders, like respondent, Birmingham, was a dealer in livestock at the same Sioux City Stock Yards. He dealt with a stranger who represented himself to be Will Buntrock, of Henkin, South Dakota. There was a genuine Will Buntrock residing at Henkin, South Dakota, a substantial citizen who lived and owned lands in that vicinity. The dealer, Flanders, did investigate and ascertain there was such a party and that he was a substantial farmer, but failed to investigate whether the party with whom he was dealing was the genuine Will Buntrock. The party with whom Flanders dealt was an impostor. When Flanders sold the impostor the cattle, he delivered to him an account of purchase and took back from him a purchase money mortgage, of which he furnished the impostor a copy. The cattle were then delivered to the railroad company consigned by the plaintiff to Will Buntrock at Henkin, South Dakota, under a straight bill of lading.

The impostor diverted this shipment to the public market at Sioux Falls. He, like the fictitious Brainman, sold the cattle through a market agency at the public stockyards at Sioux Falls, and received the proceeds. In holding, in so far as the defendant railroad company was concerned, that Dealer Flanders had passed title to the impostor, the court, on page 117, said:

> "It is to be observed that plaintiff recognized the purchaser's title by taking back from him the chattel mortgage which contained the above-noted recitals, and he placed a copy of this instrument in the hands of the purchaser. He also placed in the hands of the purchaser copy of the account sales, so that the impostor not only had the legal title, but the plaintiff clothed him with the documentary insignia of ownership. Title to the cattle being in the impostor, the railroad company, having no actual knowledge of any fraud, was not only entitled but required to make delivery to him

upon his demand, as the real owner of the property. He also had a right to change or divert the shipment while in transit."

In reversing a judgment rendered by Judge Scott, sitting in the United States District Court for the Northern District of Iowa and therefore passing upon the law of Iowa, the Eighth Circuit Court of Appeals, speaking through Judge Gardner, on page 119, said:

> "In the final analysis, it was plaintiff's mistake as to the identity of the party with whom he was dealing which led to his loss of the cattle. It cannot be said that the railway company made any mistake or that it was negligent in handling the shipment. The maxim that, 'Where one of two innocent persons must suffer by the act of the third, he by whose negligence it happens must be the sufferer,' is well grounded upon the principles of natural justice. The swindler perpetrated a fraud upon the plaintiff, and not upon the railway company. This misfortune was one of the hazards of plaintiff's business, and not one of the hazards of the railway company's business."

The *Flanders* case was identical and on all fours with the case at bar, except that the *Flanders* case was a suit against the common carrier and not against the market agency. It was there held that the hazard of which Flanders complained was the hazard of *his* business and not of the railroad company's business. It was further held that, under the old equitable maxim,—where one of two innocent persons must suffer by the act of a third, he by whose negligence it happens must be the sufferer—was a sufficient and proper defense.

In the case at bar, under the same facts, it was held by the Supreme Court of Iowa that this equitable maxim was not a defense to petitioner unless it was available to the criminal wrongdoer, and therefore was not available.

It cannot be denied that the United States District Court of Iowa and the Circuit Court of Appeals were passing upon the law of Iowa on a case involving identical facts. To hold that the railroad company, a public utility, was not liable, and to hold that petitioner, a national public utility, was liable, we submit, is to deny to petitioner the equal protection of the law guaranteed by the Fourteenth Amendment to the Federal Constitution. Sufficient authority for this is found in the cases of—

Power Manufacturing Company v. *Saunders*, 274 U. S. 490, at 493; 71 L. Ed. 1165, at page 1168;

Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32, at pages 37 and 38; 72 L. Ed. 770, at pages 773 and 774;

Frost v. *Corporation Commission*, 278 U. S. 515, at pages 522 and 523; 73 L. Ed. 483, at pages 488 and 489;

Hartford Steam Boiler Inspection & Ins. Co. v. *Harrison*, 301 U. S. 459, at 463; 81 L. Ed. 1223, at pages 1226 and 1227.

9.

THE TRUE EFFECT OF THE DECISION OF THE MAJORITY OF THE SUPREME COURT IN THE CASE AT BAR IS TO UNLAWFULLY BURDEN INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

It only lies within the realm of a truthful statement to say that, if the majority opinion of the Supreme Court of Iowa states the law regulating the liability of a market agency or national public utility, it necessarily follows:

(a) That such national public utility, compelled to render its services as by the Act provided and as hereinbefore analyzed, automatically becomes the insurer

of the title of all livestock it is compelled to receive and sell.

(b) That it also becomes the guarantor of the character, honesty and integrity of all citizens whom it is thus required to serve.

(c) That such national public utility must assume hazards inherent in the business of those speculating by buying and selling livestock, as well as hazards inherent in the business of financial institutions and others engaged in making loans on livestock.

If such were the law, then such national public utility would only have one of two courses to follow, namely:

1. To cease operating as a market agency; or

2. To adopt, until prohibited by the federal authorities, rules and regulations requiring all parties offering livestock for sale to furnish conclusive evidence as to their title and ownership of said livestock, or of their right and authority to offer such livestock for sale.

Taking up first the privilege of the market agencies to cease doing business, if there were no market agencies, there could be no centralized markets; if there were no such market agencies and no centralized markets, the flow of the commerce of livestock would be destroyed.

Taking up the second alternative, in all probability the Federal Government would hold that such rules and regulations were unlawful because they would obstruct interstate commerce. Further, if such rules were adopted with approval, they would likewise obstruct interstate commerce, because, as Justice Smith pointed out in the dissenting opinion, such rules and regulations would impede and obstruct the flow of commerce instead of making it free and unburdened, for which purpose the Packers and Stockyards Act was enacted.

Furthermore, if such rules and regulations were adopted, they would—

1. impose a great and unnecessary expense upon all honest raisers, producers and shippers of livestock;
2. create a paralyzing congestion at the centralized markets;
3. enhance the cost of marketing livestock, thus decreasing the revenue of the honest producer and increasing the cost of the consumer; and
4. ultimately destroy centralized marketing.

It has long ago been settled that any act of a state, whether by its legislature, its courts, or its administrative bodies, which impedes, obstructs and burdens interstate commerce, violates the commerce clause of the Federal Constitution.

This court, in the case of *Southern Pacific Company* v. *State of Arizona*, 325 U. S. 761, 89 L. Ed. 1915, in passing upon the validity of a statute of the State of Arizona limiting the number of cars that can be carried on any train passing through the state, on pages 773 and 779 of 325 U. S. and 1927 and 1930 of 89 L. Ed., said:

> *"The unchallenged findings leave no doubt that the Arizona Train Limit Law imposes a serious burden on the interstate commerce conducted by appellant. It materially impedes the movement of appellant's interstate trains through that state and interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service.*
>
> • • •
>
> *"Its undoubted effect on the commerce is the regulation without securing uniformity, of the length of trains operated in interstate commerce, which lack is itself a primary cause of preventing the free flow of commerce by delaying it and by substantially increas-*

ing its cost and impairing its efficiency." (Emphasis ours.)

See also:

Morgan v. *Commonwealth of Virginia*, 328 U. S. 373 at 378 and 379; 90 L. Ed. 1317 at 1323;

Webber v. *State of Virginia*, 103 U. S. 344, at 350 and 351; 26 L. Ed. 565, at 567;

State of Minnesota v. *Barber*, 136 U. S. 313, at 319 and 326; 34 L. Ed. 455, at 458 and 460;

Southern Railway Company v. *Reid*, 222 U. S. 424 at 441 and 442; 56 L. Ed. 257, at 262;

Lemke v. *Farmers' Grain Co.*, 258 U. S. 50, at 58 and 59; 66 L. Ed. 458, at 464;

Northern Pacific Ry. Co. v. *Wall*, 241 U. S. 87, at 91; 60 L. Ed. 905, at 907;

Southern Railway Company v. *Prescott*, 240 U. S. 632, at 636, 639, 640 and 641; 60 L. Ed. 836, at 838, 839, 840 and 841.

We submit that the judgment of the Supreme Court of Iowa destroys the purpose for which the Packers and Stockyards Act was enacted—to make the flow of livestock through the centralized markets free and unobstructed—and, in truth and in fact, improperly and unlawfully burdens interstate commerce.

10.

THE JUDGMENT OF THE MAJORITY OF THE SUPREME COURT OF IOWA DEPRIVES PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

Under the undisputed facts in this case, respondent, a learned and experienced cattle dealer, sold to fictitious Brainman the cattle in question without requiring any iden-

tification or making any investigation as to the truthfulness of his statements and representations. Respondent accepted the worthless check believing it to be good, believing that he had been paid for the cattle, and without calling the bank at Sioux Falls, upon which the check was drawn, to ascertain whether it would be paid upon presentation.

This Court will take judicial notice that the cost of such precaution would have been a sum substantially less than one dollar.

Respondent's loss was caused by his own negligence and his own bad judgment. It is not contended that petitioner was in any way negligent.

It is conceded that petitioner acted honestly and in good faith and rendered its services, which it was required to do as a national public utility under the Federal law.

Certainly it can be safely said that respondent's loss was from a hazard inherent in respondent's business, and not from a hazard inherent in petitioner's business.

It is the settled law of this nation as announced by an unbroken line of decisions that respondent, by delivering possession of the cattle as well as full indicia of ownership to fictitious Brainman, estopped himself from asserting title against an innocent person.

Kemper Grain Co. v. *Harbour,* 89 Kans. 824, 133 Pac. 565, 47 L.R.A. (N.S.) 173;

Keegan et al. v. *Kaufman Bros.* (Cal. App.) 156 Pac. (2d) 261;

Hoven v. *Leedham et al.,* 153 Minn. 95, 189 N. W. 601, at 603;

Nelson v. *Lewis et al.,* 143 Kans. 106, 53 Pac. (2d) 813;

Kent et al. v. *Wright L. S. Comm. Co.* (Okla.) 175 Pac. 802 (decided Jan. 7, 1947).

Likewise it has long been the settled law of this nation that where one of two innocent persons must suffer for the act of a third, he by whose negligence it happens must be the sufferer.

Chicago, M. St. P. & P. R. Co. v. *Flanders,* 56 Fed. (2d) 114, at 117;

Meadows v. *Hampton Livestock Comm. Co. et al.,* 55 Cal. App. 634, 131 Pac. (2d) 591;

Orillia Lumber Co. v. *Chicago, M. & St. P. R. Co.,* 84 Wash. 362, 146 Pac. 850, at 853;

Kuykendall v. *Lambert,* 68 Okla. 258, 173 Pac. 657, at 659;

First Nat'l Bank of Holdenville v. *Kissare,* 22 Okla. 545, 98 Pac. 433, at 434;

Michigan Central R. R. Co. v. *Phillips, et al.,* 60 Ill. 190, at 195;

Capital Automobile Co. v. *Ward* (Ga.), 189 S. E. 713, at 714, 715;

Goddard Grocer Co. v. *Freedman* (Mo. App.) 127 S. W. (2d) 759, at 764.

In the case of *Crescent Chevrolet Company* v. *Lewis, et al.,* 230 Ia. 1074, 300 N. W. 260, a distributor of automobiles had sold and delivered an automobile to a dealer, accepting as payment a worthless check. The dealer, before it became known that the check was worthless, executed a mortgage to the Securities Acceptance Corporation to secure money borrowed from it. The distributor thereafter brought a replevin action naming the estate of the dealer, then deceased, and the Acceptance Corporation as defendants. The Acceptance Corporation was not a purchaser, but a secured creditor. The Supreme Court of Iowa, in speaking through the same justice who wrote the opinion in the instant case, Justice Oliver, and in deciding in favor

of the Acceptance Corporation because it was an innocent person, on page 262 of 300 N. W., said:

> "The more recent authorities usually base such holdings upon the doctrine that where the owner of personal property so clothes another with indicia of title as to deceive a bona fide purchaser relying thereon, the purchaser will be protected against the true owner. The rule does not depend upon actual title, but rests upon conduct of the party which precludes him from disputing, as against the innocent acting person, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the third party. *Gustafson* v. *Equitable Loan Ass'n*, 186 Minn. 236, 243 N. W. 106. *This is but an application of the broad general principle that when one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury must bear the loss. Under the facts in this case, we conclude the mortgage of Securities Acceptance Corporation is superior to plaintiff's rights.*" (Emphasis ours.)

This old equity maxim is not a maxim invoked for the benefit only of purchasers and secured creditors, it is invoked for all innocent persons who become involved.

Justice Oliver, in speaking for the majority in the case at bar and holding that petitioner acted in good faith, on page 45 said:

> "Apparently both dealt with pretended Brainman in good faith and relied upon his representations." (R. 45.)

Certainly it has not been and cannot be successfully contended that petitioner did not act innocently in the matter. Counsel for respondent, in their resistance to petitioner's petition for rehearing, in speaking upon this matter said:

> "The innocence or good faith of the appellee (mean-

ing petitioner) in the sale of the cattle for the fictitious Brainman can have on (meaning no) bearing in this case, because it is not an innocent purchaser for value and as a factor, its right can rise no higher than those of its principal. * * * Were this an action against the person who bought the cattle from the appellee (meaning petitioner), such doctrine would apply because the purchaser of the cattle from the appellee would be an innocent purchaser for value and entitled to the protection of that doctrine." (R. 127.)

It certainly lies within the realm of a truthful, conservative statement to say that the majority of the Supreme Court of Iowa adopted respondent's counsel's contention. This is testified to by the part deleted by the majority upon rehearing (R. 138, 139). With the part deleted, there is nothing contained in the majority opinion to sustain its action in denying the application of this maxim.

This Court is committed to the rule that where the action of a court is unjust, arbitrary, oppressive, unreasonable, or confiscatory, such action denies to litigants "due process of law."

Ballard v. *Hunter,* 204 U. S. 241, at 255, 256; 51 L. Ed. 461, at 472;

Hurtado v. *People of California,* 110 U. S. 516, at 530 to 532, incl., 28 L. Ed. 232, at 237;

St. Joseph Stock Yards Co. v. *United States,* 298 U. S. 38, at 51, 52; 80 L. Ed. 1033, at 1041, 1042;

Missouri Pacific Ry Co. v. *Tucker,* 230 U. S. 340, at 348, 349; 57 L. Ed. 1507, at 1509, 1510;

Ex Parte Young, 209 U. S. 123, at 163, 164; 52 L. Ed. 714, at 730, 731;

Wadley Southern Ry. Co. v. *State of Georgia,* 235 U. S. 651, at 662, 663; 59 L. Ed. 405, at 412;

Bluefield Water Works & Improvement Co. v. *Public Service Commission of W. Va.*, 262 U. S. 679, at 690; 67 L. Ed. 1176, at 1181, 1182;

Southern Iowa Electric Co. v. *City of Chariton*, 255 U. S. 539, at 541, 542; 65 L. Ed. 764 at 775;

Norfolk & Western Ry. Co. v. *Conley, Atty. Gen. of the State of W. Va., et al.*, 236 U. S. 605, at 614; 59 L. Ed. 745, at 749, 750;

Railroad Retirement Board v. *Alton R. R. Co.*, 295 U. S. 330, at 357; 79 L. Ed. 1468, at 1480;

Denver Union Stock Yards Co. v. *United States*, 57 Fed. (2d) 735, at 739.

In concluding this point, we submit that the question here presented is not as to whether or not the majority of the Supreme Court of the State of Iowa rendered an erroneous decision,—the question here presented is whether the Supreme Court of Iowa under the undisputed facts in this case has acted in an unjust, arbitrary, oppressive, unreasonable or confiscatory manner, and thus denied this petitioner its constitutional rights.

11.

WHERE A JUDGMENT OF A STATE COURT IS IN DEROGATION OF A RIGHT UNDER A FEDERAL STATUTE OR THE FEDERAL CONSTITUTION, A FEDERAL QUESTION IS NECESSARILY PRESENTED WHICH IMPOSES UPON THIS COURT THE DUTY OF TAKING JURISDICTION THEREOF.

In the case of *Ward* v. *Board of County Commissioners*, 253 U. S. 17, 64 L. Ed. 751, this court, speaking through Justice Van Devanter, on page 22 of 253 U. S. and page 758 of 64 L. Ed., said:

> *"The right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given*

due recognition, by the supreme court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support." (Emphasis ours.)

In the case of *Straus* v. *American Publishers' Assn.*, 231 U. S. 222, 58 L. Ed. 192, this court, on page 234 of 231 U. S. and 199 of 58 L. Ed., said:

"*One who sets up a Federal statute as giving immunity from a judgment against him, which claim is denied by the decision of a state court, may bring the case here for review* * * *." (Emphasis ours.)

In the case of *Sage* v. *Hampe*, 235 U. S. 99, 59 L. Ed. 147, this court, speaking through Justice Holmes, on page 104 of 235 U. S., and 150 of 59 L. Ed., said:

"*The defendant relied upon the act of Congress as a defense and is entitled to come to this court.*" (Emphasis ours.)

In the case of *Hotel & Restaurant Employees' International Alliance* v. *Wisconsin Employment Relations Board, et al.*, 315 U. S. 437, 86 L. Ed. 946, this court, speaking through Justice Frankfurter, at page 440 of 315 U. S., and 950 of 86 L. Ed., said:

"*Whether Wisconsin has denied the petitioners any rights under the federal Constitution is our ultimate responsibility.*" (Emphasis ours.)

In the case of *Copperweld Steel Co.* v. *Industrial Commission of Ohio*, 324 U. S. 780, 89 L. Ed. 1363, this court, speaking through Justice Roberts, on p. 785 of 324 U. S., and 1366 of 89 L. Ed., said:

"*But, as violation of the Federal Constitution by the*

> ***decision of the state court, is, in any case, involved, we have jurisdiction to review the decision on certiorari * * *.*** (Emphasis ours.)

In the case of *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192, 89 L. Ed. 173, this court, speaking through Chief Justice Stone, on page 203 of 323 U. S., and 184 of 89 L. Ed., said:

> *"Since the right asserted by petitioner 'is . . . claimed under the Constitution' and a 'statute of the United States,' the decision of the Alabama court, adverse to that contention is reviewable here under § 237 (b) of the Judicial Code, 28 USCA § 344, 8 FCA title 28, § 344, unless the Railway Labor Act itself has excluded petitioner's claims from judicial consideration."* (Emphasis ours.)

Also see:

American Sugar Refining Co. v. *State of Louisiana,* 179 U. S. 89, at 91; 45 L. Ed. 102 at 103;

Davis v. *Farmers Cooperative Equity Company,* 262 U. S. 312, 67 L. Ed. 996;

Atchison, Topeka & Santa Fe v. *Wells,* 265 U. S. 101, at 103; 68 L. Ed. 928, at 931;

Broad River Power Company, et al. v. *State of South Carolina, etc.,* 281 U. S. 537, at 540; 74 L. Ed. 1023, at 1030.

Petitioner, in requesting this court to grant the writ of certiorari, comes to the only door left open for relief from the decision of the majority of the Supreme Court of Iowa. Petitioner comes to the door created by our Constitution for the protection of those who are oppressed by having been denied their rights either under the Federal statutes or the Federal Constitution. The importance of this question to petitioner and all other market agencies is readily apparent.

CONCLUSION.

In conclusion, we submit that:

(1) The opinion rendered by the majority of the Supreme Court of Iowa denies to this petitioner an immunity to which it is entitled under the Packers and Stockyards Act of 1921, as amended;

(2) The decision of the majority of the Supreme Court of Iowa denies to petitioner its constitutional rights as hereinbefore set forth;

(3) A writ of certiorari should be allowed as prayed for, the case reviewed by this court on its merits, and the judgment of the Supreme Court of Iowa reversed.

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM, A. D., 1947

No. 233

RICE BROS., a partnership consisting of Charles R. Rice, Wm. J. Downey and John J. Donohue,

Petitioner,

vs.

E. H. BIRMINGHAM,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 233

RICE BROS., a partnership consisting of Charles R. Rice, Wm. J. Downey and John J. Donohue,

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vs.

E. H. BIRMINGHAM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of Iowa (R. p. 44) is not yet officially reported, but appears in 26 N. W. 2nd, p. 39.

JURISDICTION

The judgment of the Supreme Court of Iowa was entered on February 11, 1947, and appellant's petition for rehearing in that Court was overruled on May 9,

1947. The petition for writ of certiorari was filed on July 30, 1947. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344).

QUESTION PRESENTED

The petitioner, a stockyards commission merchant at Sioux City, Iowa, and Sioux Falls, South Dakota, registered as a market agency under the Packers and Stockyards Act, sold cattle as agent for a party who gave the fictitious name of "John Brainman." The cattle had been obtained by said John Brainman from the respondent who was the owner of them by misstating his identity and by issuing a worthless check for the purchase price. The question presented is whether ~~a~~ petitioner is liable to respondent for conversion of the cattle. This same question has previously been before this Court in the case of *Mason City Production Credit Association vs. Sig Ellingson and Company,* 205 Minn. 536, 386 N. W. 713; 308 U. S. 599; 60 Supreme Ct. 130; 84 Law Edition 501, in which the petition for writ of certiorari was denied.

STATEMENT

The facts are not in dispute. They may be summarized as follows:

The petitioner is a partnership engaged in business as a livestock commission merchant in Sioux City, Iowa,

and Sioux Falls, South Dakota, and is registered as a market agency under the Packers and Stockyards Act, 1921, 42 Stat. U. S. C. A. Title 7, Section 181 et seq. (R. pp. 29-30). On June 6, 1945, petitioner received from a party who gave the name of John Brainman fifteen head of cattle and on the following day sold them at Sioux Falls, South Dakota, as agent for said John Brainman, and, after deducting their commission and the truck charges, delivered a check for the balance in the sum of $1,261.36 to said John Brainman. The cattle had been obtained on June 6, from the respondent, the owner of them, by the said John Brainman who represented himself to be a farmer from Dell Rapids, South Dakota (R. p. 20), upon delivering to the respondent a check drawn on the Northwestern Security Bank at Sioux Falls, South Dakota, in the sum of $1,405.25 (R. p. 12). Said check was later dishonored for the reason that no such person and no such account existed (R. p. 13). The respondent instituted suit for conversion of the cattle in the District Court of Iowa, for the Fourth Judicial District. At the close of the plaintiff's evidence, the Court directed a verdict in favor of the petitioner (R. p. 38), which judgment was reversed by the Supreme Court of Iowa, on February 11, 1947 (R. p. 44) and rehearing thereon was denied on May 9, 1947 (R. p. 138). Issuance of the writ of procedendo has been stayed pending application for writ of certiorari to this Court (R. p. 141).

ARGUMENT

Certiorari in this case could only be granted under that provision of Section 237 of the Judicial Code, U. S. C.

Title 28, Section 344 (b), which provides for the review of a state court decision

> "where any title, right or privilege or immunity is specifically set up or claimed * * * under the Constitution, or any * * * statute of * * * the United States."

Under the uniform decisions of this Court, it does not suffice that a federal question is formally raised in the state court proceedings; a federal question relied on must have substantial foundation or merit. See, e. g. *Equitable Life Assurance Soc. v. Brown,* 187 U. S. 308; *New Orleans Waterworks Company v. Louisiana,* 185 U. S. 336 and authorities cited.

"A reading of the decision of the Supreme Court of the State of Iowa will reveal that that Court found that aside from the defense of the Packers and Stockyards Act, the petitioner's defenses were without merit and its liability for conversion was established as a matter of law. It is apparent, therefore, that the decision of the Supreme Court of Iowa was made to rest in part upon some ground of local law sufficient enough in itself to sustain the judgment independently of any question of federal liability."

> *Home for Incurables v. City of New York,* 187 U. S. 155, 47 Law Edition 117.

The decision of the court below quite obviously involves only local law and presents no substantial federal question. The holding is merely that under the law of Iowa, an agent, factor or commission merchant who receives property from his principal, sells it under the latter's instructions and pays him the proceeds of the

sale, is guilty of conversion if his principal had no title thereto or right to sell the property. The decision is in accord with prior rulings of the Iowa Supreme Court. *Mau vs. Rice Bros.*, 216 Iowa 864, 249 N. W. 206; *Wardner, Bushnell & Glessner Co. vs. Harris*, 81 Iowa 453, 46 N. W. 859.

Much of the petitioner's brief is addressed simply to the proposition that the rule thus established is erroneous as a matter of local law. These assignments of error do not even formally raise a federal question and, consequently, provide no basis for issuance of the writ requested.

The remaining assignments of error are directed to the alleged error of the court below in applying this local rule to a market agency registered under the Packers and Stockyards Act. The petitioner's position is that the provisions of the Packers and Stockyards Act make it a "federal public utility" that as such it cannot under federal law be held liable for conversion in the circumstances here presented and that the contrary decision of the court below has the effect of burdening interstate commerce and depriving the petitioner of rights guaranteed to it under the Fourteenth Amendment (Assignment of Errors 1-6, Pet. pp. 9-23).

No useful purpose would be served by discussing the nomenclature issue tendered by petitioner in its assertion that the Packers and Stockyards Act makes it a "federal public utility." The Act simply requires stockyard commission merchants such as petitioner to register and imposes upon them as registered agencies certain duties and obligations. It contains no provision, expressed or

implied, which relieves registered agencies from their ordinary labilities under state law. To the contrary, Section 308 of the Act (42 Stat. 165, U. S. C. A. Title 7, Section 181 et seq.) which imposes liability on registered agencies for certain violations of the Act and provides that this liability may be enforced either by complaint to the Secretary of Agriculture or by suit in federal courts, expressly states that:

> "this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Since even in the case of specific violations of the Act, where a specific remedy is granted, state law remedies may nonetheless be availed of by the party wronged. It seems clear that such remedies may be availed of in cases which do not involve violation of the Act and for which the Act makes no provision.

The declared purpose of the Act is to provide uniformity through the country in the operation of the business of packers and stockyards and no reference is made therein of any intent of Congress to change or regulate the common law liability of market agencies. In determining whether a federal question is presented, the Court should not read into the Act something that is not essential to the operation of the statute. That Congress did not in its consideration of the foregoing section, while discussing the subject of common law liability, provide further specifically that market agencies be relieved from common law liability lends further strength to the argument that Congress did not so intend the Act as consti-

tuting a change as to common law liability. It is to be noted that the rules and regulations issued by the Secretary of Agriculture as authorized in said Act provide for payment of the proceeds of sales by market agencies to the owner. (R. p. 133 et seq.) In the instant case, the Act is fully operative without supplying an intent not found in the Act to relieve factors from common law liability. It was not to regulate the law of factors but to make all packers, stockyards and market agencies conform to certain regulations with relation to the operation of their businesses that the statute was enacted. The fact that the Packers and Stockyards Act does not preclude application of state law to a registered market agency makes unnecessary consideration of petitioner's contention that its liability is governed by a general federal law and that the federal law is contrary to the decision below.

Nor need detailed consideration be given to the argument that the rule of law established by the decisions below burdens interstate commerce. The respondent was the absolute owner of the cattle involved in this case and was free to deal with them as he liked. He could sell the cattle within the state or for shipment outside the state. He had placed them in pens and cared for them awaiting such disposition as he might see fit to make for his own profit. The cattle were not being held by the respondent for the purpose of promoting their safe or convenient transit. They were not in transit.

> "Where property has come to rest within a state, being held there at the pleasure of the owner for disposal or use so that he may dispose of it either within the state or for shipment elsewhere as his

interest dictates, it is deemed to be a part of the general mass of property within the state and thus subject to its taxing power."

State of Minnesota v. George Blasius, 290 U. S. pp. 1-12, 78 Law Edition, p. 130.

Davis v. Cleveland C. C. & St. L. Ry. Co., 217 U. S. 157 is decisive authority against petitioner's position. This Court there held that a state law authorizing an attachment of railroad cars used in interstate commerce did not contravene the Interstate Commerce Act or unconstitutionally obstruct commerce between the states. The Court stated (p. 177): "It is very certain that when Congress enacted the Interstate Commerce Law it did not intend to abrogate the attachment laws of the states." See also *Palmer v. Texas,* 212 U. S. 118; *International Milling Co. v. Columbia Transportation Co.,* 292 U. S. 511; *Natural Gas Co. v. Slattery,* 302 U. S. 300, 306-307. Obviously if an attachment under state law of facilities directly used in interstate commerce does not burden that commerce, no such burden can be found in the mere imposition of monetary liability for acts deemed tortious under state law.

Petitioner's assertion of a violation of equal protection clause of the Fourteenth Amendment is equally groundless. The rule of law established by the decision below is general in nature; nothing in the opinion indicates that it will not be applied to all persons either engaged in public utility operations or in purely private transactions. The petitioner's assertion that the decision deprives it of equal protection because the rule does not apply to common carriers is, therefore, without foundation in fact. Moreover, as the court below points out (R.

p. 52), there is a fundamental difference between a registered market agency and a common carrier. A carrier does not undertake to deal with or in any way affect the title of the property which it transports while the very business of a stockyards commission merchant, such as petitioner, is to act as agent in transferring title.

While petitioner contends that the decision violates the due process as well as the equal protection clause of the Fourteenth Amendment, it seems quite obvious that the petitioner has not been deprived of any property rights whatever, and that the alleged violation consisted merely of the fact that under the decision of the state court which it believes to be erroneous, it is required to pay damages.

The identical question involved herein was before this Court on petition for writ of certiorari from the Supreme Court fo the State of Minnesota in the case of *Mason City Production Credit Association vs. Sig Ellingson and Company,* supra, wherein the petition was denied, and later a motion for rehearing on said petition for writ of certiorari was filed and it likewise was denied by this Court, 308 U. S. 637; 60 Supreme Court 178; 84 Law Edition 529. The same counsel that appears for the petitioner in this case appeared for the petitioner in the Sig Ellingson case, and there, as here, urged the adoption of his "public utility" theory, as shown by the petition for writ of certiorari and brief in support thereof, filed in that case. While not expressly so stated, the only reason upon which a denial of a writ of certiorari in the Sig Ellingson case can be explained is that this Court found no federal question involved. The

same proposition is again presented in the instant case, and no substantial federal question being involved, the petition should, therefore, be denied.

Respectfully submitted,

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August, 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 233

RICE BROS., a partnership consisting of Charles R. Rice, Wm. J. Downey and John J. Donohue,
Petitioner,

vs.

E. H. BIRMINGHAM,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF.

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Respondent's contention that the provisions of Section 308 of the Act, Section 209 of 7 U.S.C.A., continued the liability of market agencies as national public utilities for conversion of stolen or mortgaged property the same as it existed before the enactment of the Act in question when they operated as private agencies.

This section of the Act in the first place only pertains to the liability of a market agency for violating the terms and conditions of the Act by giving the Secretary of Agriculture jurisdiction to hear complaints and award damages or by giving an injured party the right to sue in the United States District Court, and then provides that this section should not abridge or alter the remedies then existing at

the common law or by any statute, but that such remedies should be in addition thereto.

Before the Act was enacted, anyone damaged by the unlawful acts of a livestock commission merchant could sue at the common law and could sue in conversion if such plaintiff's property rights had been violated in a manner which would impose liability upon such commission merchant.

That right still exists today. It is not the contention of the petitioner that the Act has abrogated or destroyed that right. However, the plaintiff in such an action can only recover when the acts of a market agency have been such as would impose liability upon the market agency.

Petitioner concedes that if at the time it rendered its services petitioner had knowledge of plaintiff's alleged and claimed rights and acted in defiance of such rights, then it would be liable for conversion in this case. However, it is conceded that petitioner had no such knowledge and acted honestly and in good faith. Therefore, clearly the right of any person to maintain a suit for conversion against a market agency where the facts are such as to impose liability on the market agency, still exists.

What petitioner contends is that it, having been converted from a private agency into a national public utility compelled to promptly render its services without discrimination to all comers the same as a common carrier, was automatically granted an immunity from liability for conversion unless at the time it rendered its services it had knowledge of the rights of the injured person and acted in defiance of such rights. This clearly presents a question of a claimed immunity or exemption under the Federal Act in question. Petitioner further claims an immunity or exemption on account of the exclusive exercise and control of the industry by the Federal Government.

This clause in the Act in question is exactly the same as contained in Section 22 of the Interstate Commerce Act. Still, it is conceded that common carriers, by reason of the compusory nature of their services, cannot be held liable in conversion for transporting stolen or mortgaged property unless, at the time they are rendering their services, they have knowledge that such property is stolen or mortgaged.

It is settled law that the only rights and remedies preserved by this provision are those which are not inconsistent with the rights and remedies created by the statute.

Texas Pacific R.R. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426; 51 Law Ed. 553;
Robinson v. *Baltimore & Ohio R.R. Co.*, 222 U. S. 506; 56 Law Ed. 288;
Keogh v. *Chicago & North Western Ry Co.*, 260 U. S. 156; 67 Law Ed. 183.

In the case of *Pennsylvania R.R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, 59 Law Ed 867, this Court, in speaking upon this same provision contained in the Interstate Commerce Act, on page 129 of 237 U. S. and on page 872 of 59 Law Ed., said:

> *"That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute."* (Emphasis supplied.)

As the Packers & Stockyards Act converted petitioner into a federal public utility and imposed upon petitioner all the burdens, duties, responsibilities, and liabilities of a public utility, it necessarily follows that the Act in question granted to petitioner all the privileges, benefits, and

immunities granted to such public utilities on account of the compulsory nature of their services, as the same have been determined by many decisions of the courts.

Respondent's statement that there are no Federal questions presented, when considered in the light of the real questions involved, becomes a mere assertion without force.

Wherefore petitioner submits that the writ of certiorari should be allowed as prayed for and the case reviewed by this Court on its merits, and the judgment of the Supreme Court of Iowa reversed.

Respectfully submitted,

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The question as to whether petitioner, a market agency, a national public utility, can be held liable in conversion for receiving and selling stolen or mortgaged property without having knowledge that the property is stolen or mortgaged or of any fact to place it upon inquiry at the time it is rendering its services and before it completes the same, presents an important federal question for the determination of this court. It presents a question that petitioner and all similar market agencies, national public utlities, are entitled to have determined by this court at this time 1-7

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Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, being entirely in the dark and not informed as to why or for what reason this court denied its petition, believes that petitioner either failed to clearly state the grounds or reasons for this court's jurisdiction, or that this court overlooked or misapprehended certain material matters therein contained.

Petitioner therefore presents this petition for a rehearing of its original petition for writ of certiorari within the time provided by the rules of this court for the filing thereof. This court denied petitioner's original petition October 13, 1947. Petitioner adopts and makes a part hereof said original petition and supporting brief.

I.

The question as to whether petitioner, a market agency, a national public utility, can be held liable in conversion for receiving and selling stolen or mortgaged property without having knowledge that the property is stolen or mortgaged or of any fact to place it upon inquiry at the time it is rendering its services and before it completes the same, presents an important federal question for the determination of this court. It presents a question that petitioner and all similar market agencies, national public utilities, are entitled to have determined by this court at this time.

The enactment and enforcement of the Packers and Stockyards Act converted petitioner from the status of a private agency to that of a national federal public utility. This is settled beyond peradventure by decisions of this court and other federal tribunals.[1] This was conceded by the opinion of the majority of the Supreme Court of Iowa.

Petitioner and all other market agencies, livestock commission merchants, must serve all comers promptly and without discrimination. Petitioner cannot require of one shipper, patron, or customer evidence of such shipper's title, ownership, right and authority to sell the livestock that it does not require of all of its shippers, patrons and customers. It must serve all alike. Petitioner cannot charge one shipper, patron or customer for services one penny more than it charges other customers, patrons or shippers. It cannot charge a shipper, customer or patron for its services more than the maximum amount fixed and determined by the Secretary of Agriculture as a proper charge for such services. Petitioner cannot refuse to render its services to any shipper of livestock unless at the time it makes such refusal it has knowledge of facts which furnish a proper basis and reason to protect it in so doing.

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[1] See authorities cited and discussed in our original brief, pp. 15-19, incl.

Petitioner procured its authority to act as a market agency by virtue of being registered with and licensed by the Secretary of Agriculture under the Packers and Stockyards Act. Petitioner is in no way operating as a market agency or otherwise under any law of the state of Iowa.

Petitioner, in rendering the services which it did to fictitious Brainman, acted honestly and in good faith and without knowledge of respondent's claimed rights, and did nothing more than it was required to do as a national public utility under the federal law. On the other hand, respondent was under no such legal obligation under the federal law or otherwise to sell his cattle to fictitious Brainman. At all times respondent was free to sell his cattle to whom he pleased, when he pleased, and upon such terms and conditions as he pleased.

The prompt accounting to the shipper, Brainman, for the proceeds derived from the sale was one of the necessary duties imposed upon petitioner by the federal statute and the exclusive federal control and regulation of the markets.

Certainly no one can contend, at least not successfully, that the Federal Government, by the Act in question and the construction thereof given to it by this court and other federal tribunals, did not take over the entire field of regulating and controlling the marketing of livestock in this nation.

It has always been the law of this nation (with the exception hereinafter referred to), settled by a long line of judicial decisions, that a public utility which, without knowledge and in good faith, renders its services to a person wrongfully in possession and without authority, cannot be held liable in conversion for rendering services pertaining to stolen or mortgaged property.[2]

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[2] See authorities cited and discussed in our original brief, pp. 13-26, incl.

The exception referred to started with the case of *Mason City Production Credit Association* v. *Sig Ellingson and Company,* 205 Minn. 537, 286 N.W. 713, in which this court denied a petition for writ of certiorari (308 U. S. 599, 84 Law Ed. 501; 308 U. S. 637, 84 Law Ed. 529). Thereafter the Supreme courts of the states of South Dakota and Washington,[3] without any independent or original consideration or discussion whatsoever, followed the Minnesota case *entirely* because this court denied the petition for writ of certiorari, thereby evidently erroneously believing that this court, by denying the writ of certiorari, approved and affirmed the decision of the Supreme Court of Minnesota.

The majority of the Supreme Court of Iowa, evidently laboring under the same belief, rendered the decision in the case at bar of which complaint is made (26 N.W. (2d) 39-46, incl.). A denial of the writ in the case at bar may cause the courts of other states not having previously passed upon the question, to commit the same error.

The four dissenting members of the Iowa Supreme Court, believing the decisions of the Supreme courts of the states of Minnesota, South Dakota and Washington were erroneous, filed a learned dissenting opinion written by Justice Smith, in which the minority were of the opinion that the law which has always been the law of this nation should be followed.

The courts of Missouri, in the case of *Blackwell* v. *Laird, et al,* 236 Mo. App. 1217, 136 S.W. (2d) 91, refused to follow these decisions and determined the law of Missouri to be as contended by petitioner and as set forth in the dissenting opinion of Justice Smith in the case at bar.

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[3] First National Bank of Pipestone v. Siman, et al, 67 S. D. 118, 289 N. W. 416; Moderie v. Schmidt, 6 Wash. (2d) 592, 108 Pac. (2d) 331.

The trial courts of two other states where the question has been presented refused to follow the *Sig Ellingson* case, as did the trial court in the case at bar, but on the contrary followed the *Blackwell* case, which is supported by this long line of authorities.

The majority of the Supreme Court of Iowa and the Supreme courts of Minnesota, South Dakota and Washington recognized that petitioner and all other market agencies were converted by the Act in question into national public utilities, required to carry out and perform all the burdens, duties, regulations and responsibilities of a public utility, but held they were entitled to no rights, benefits, privileges, exemptions and immunities enjoyed by all other public utilities of the nation on account of the nature of their compulsory services.

These decisions were based on the premise that there was no provision in the Packers and Stockyards Act expressly granting petitioner any of such rights, privileges, exemptions and immunities. Petitioner bases its claimed rights, privileges, exemptions and immunities not on any particular provision of the Packers and Stockyards Act, but entirely upon the fact that the Act converted petitioner from the status of a private agency to that of a national public utility.

Certainly Congress, much experienced in this field of legislation, knew all of the burdens, duties, regulations and responsibilities it was placing upon petitioner and all other market agencies by converting them into national public utilities. Likewise Congress knew of the benefits, privileges and immunities to which all public utilities, on account of the compulsory nature of their services, were entitled. If Congress desired to even attempt to deny market agencies these benefits, privileges, exemptions and immunities, it would have found words to have so provided.

The Supreme Court of Iowa was not content to simply hold that petitioner, a public utility, was not entitled to such rights, privileges, exemptions and immunities, but went further and held that petitioner became the guarantor of the honesty and integrity of those whom it was thus compelled to serve, and became an insurer of the title to the livestock it was thus compelled to promptly receive and sell.

The majority of the Supreme Court of Iowa went still further—it required petitioner to become an insurer of all livestock dealers against loss incurred by their own bad judgment, as well as their own culpable and wilful negligence. This is necessarily true because it is without dispute in the record that respondent delivered both title and indicia of title and possession to fictitious Brainman, believing he had been paid for the livestock (R. 17). It is common knowledge that respondent could have averted the entire loss by a telephone call, at a cost of probably not to exceed sixty-five cents, to ascertain the validity or value of the check.

Petitioner is claiming a right, privilege, exemption or immunity under a statute of the United States, as well as under the exclusive authority exercised by the United States, in controlling petitioner and other market agencies engaged in the marketing of livestock. Certainly this presents a federal question which is the duty of this court to review under subparagraph (b) of Section 237 of the Judicial Code, which is also Section 344 of Title 28, U.S.C.A.

This federal question is most vital to petitioner and all other market agencies. Upon its proper disposition rests entirely the future of market agencies. Were the law announced by the Supreme Court of Iowa to become the national law, the unknown hazards to which market agencies

would be subjected would present to anyone a permanent bar and barrier to engage in that business. The liability of petitioner and all other market agencies could never be determined after receiving and selling livestock until the expiration of the statutory period of limitations for a suit in conversion. It would be too late to lock the door after the horse had been stolen. Many market agencies could be driven out of business after they had been rendered insolvent by such a harsh, unjust rule of law.

This federal question is being decided differently by different states of the Union, with the result that the liability of a market agency can vary with as many states as there are states in the Union. It is a federal question that should, therefore, be decided and set at rest by a decision of this court at this time.

II.

Petitioner, by the decision of the majority of the Supreme Court of Iowa, has been denied its right and guarantees under the federal constitution. This decision likewise unduly burdens interstate commerce, in violation of the commerce clause.

The majority opinion of the Iowa Supreme Court clearly recognized the law to be that all other public utilities engaged in the same current of commerce, where they innocently and without knowledge rendered their services in the handling of stolen or mortgaged livestock, were exempt from liability for conversion on account of the compulsory nature of their services. At the same time, and in the same breath, that court held that petitioner, a national public utility, under like circumstances was not exempt from such liability, although it was under like compulsion to render its services in the same current of commerce. This clearly denied your petitioner the equal protection of the law guaranteed by the Fourteenth

Amendment to the Federal Constitution. This is fully covered in our original brief, pages 32 to 40, inclusive.

The Packers and Stockyards Act was clearly enacted to make free and unburdened the flow of livestock through the centralized markets. The true effect of the decision of the Iowa court is to unduly and unlawfully burden that flow of commerce. See our original brief, pages 40 to 43, inclusive.

Petitioner seeks not to invoke the jurisdiction of this court because the decision of the majority of the Supreme Court of Iowa was grossly erroneous; petitioner seeks to invoke the jurisdiction of this court because the decision of the Iowa court in the light of the compulsion imposed upon petitioner by the Packers and Stockyards Act, was unjust, arbitrary, oppressive, unreasonable and confiscatory, and thus deprived petitioner of its property without due process of law, in violation of the Fourteenth Amendment. See our original brief, pages 43 to 48, inclusive.

Clearly the decision of the majority of the Supreme Court of Iowa violated the Federal Constitution in at least the three above respects.

III.

Where a litigant has, by a judgment of a state court, been denied its rights, privileges, exemptions or immunities granted by federal statute or guaranteed by the federal constitution, it is the solemn duty of this court to take jurisdiction and correct the error.

We attempted to cover this point in our original brief on pages 48 to 50, inclusive.

That this court should grant the writ and take jurisdiction, both because of petitioner's being denied the rights privileges, exemptions and immunities granted and

created by the Federal Statute in question, and because of the violation of petitioner's constitutional rights, is further settled and determined by the decisions of this court in the following cases:

California National Bank v. *Kennedy*, 167 U. S. 363, at 365 and 366; 42 Law Ed. 167, at 199 and 200.

Merchants National Bank of Cincinnati v. *Wehrmann, etc.* 202 U. S. 295, at 299; 50 Law Ed. 1036, at 1039 and 1040.

Chambers v. *B. & O. R. R. Co.*, 207 U. S. 142, at 148; 52 Law Ed. 143, at 146.

Many years ago, this court, speaking through Mr. Chief Justice Marshall, in the case of *Cohens* v. *Virginia*, 6 Wheat (19 U. S.) 264, at 404, 5 L. Ed. 257, at 291, said:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."

Now here is an inhibition voiced with authority, upon which may be predicated the further statement that the rights of a litigant to a determination of his Constitutional rights, although in review of a state decision, are not alone dependent upon Section 237 of the Judicial Code or Rules of Court made pursuant thereto.

The right to be heard on an issue of this grave import is wider than the Due Process Clause or the Equal Pro-

tection Clause, or the Fifth Amendment or the Fourteenth Amendment, or the Constitution itself. It is broader than all of them. It is as wide as the fundamental Bill of Rights, upon which all free government is erected. The right to be heard when the voice of oppression threatens, is an inherent right of all free men.

CONCLUSION.

In conclusion, we submit that this court should vacate its order of October 13, 1947, denying the original petition, and should grant the writ of certiorari as prayed for in that petition and supporting brief and hear this case on its merits, and reverse the judgment of the Supreme Court of Iowa.

Respectfully submitted,

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I Hereby Certify that the foregoing petition is presented in good faith and not for delay.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 233

RICE BROS., A PARTNERSHIP CONSISTING OF CHARLES R. RICE, WM. J. DOWNEY AND JOHN J. DONOHUE,
Petitioner,

vs.

E. H. BIRMINGHAM,
Respondent.

ON PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

MOTION OF NATIONAL LIVE STOCK EXCHANGE, CHICAGO, ILLINOIS, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

NATIONAL LIVE STOCK EXCHANGE,
Movant.
By FRANCIS X. BUSCH,
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 233

RICE BROS., A PARTNERSHIP CONSISTING OF CHARLES R. RICE, WM. J. DOWNEY AND JOHN J. DONOHUE,

Petitioner,

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E. H. BIRMINGHAM,

Respondent.

MOTION OF NATIONAL LIVE STOCK EXCHANGE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Now comes the NATIONAL LIVE STOCK EXCHANGE, by Francis X. Busch, its attorney, and moves the Court for leave to file instanter herein a brief as *amicus curiae*, and in support of its said motion shows:

(a) The National Live Stock Exchange is an unincorporated association. It was organized in 1885. Its offices are located at Chicago, Illinois. Its membership is composed of twenty-five (25) local livestock exchanges located at the twenty-five leading livestock markets of the United States.[1] Its purpose is to pro-

1. Buffalo, Chicago, Cincinnati, Cleveland, Denver, Detroit, Indianapolis, Jersey City, Lancaster, Los Angeles, Louisville, Memphis, Milwaukee, Montgomery, National Stock Yards, Ill. (St. Louis), Oklahoma City, Omaha, Portland, Sioux City, Sioux Falls, So. St. Joseph, So. St. Paul, San Francisco, Tulsa, and Wichita.

mote and serve (1) the development of the livestock industry, (2) the protection of all interests of the patrons of public markets, and (3) the advancement of the interests of its members.

(b) During the year 1946, sales of cattle, hogs, and sheep in the United States amounted in value to over seven billion dollars.[2] Of this amount it is estimated that sales in excess of two billion dollars were effected through "market agencies," of which the petitioner is typical, all operating under regulations of the Secretary of Agriculture and pursuant to the Packers and Stockyards Act. There are over 500 member firms engaged in the business of selling livestock on commission through movant's member exchanges. The receipt, handling and sale of thousands of head of cattle, hogs and sheep, at markets far removed from their point of origin or shipment present daily problems of magnitude. The press of business is tremendous; the demands for speed and efficiency in handling transactions most exacting. For example, on Monday, Oct. 20, 1947, at Chicago, Illinois, 13,500 cattle, 9,200 hogs, 2,000 sheep, and 1,000 calves were received. These were required to be penned, cared for, sorted, exposed for sale, and when sold, weighed and the proceeds of sale immediately accounted for. The total income to the particular market agency is an average commission of less than one-half (½) of one (1) per cent on gross value of live stock handled. There is neither time nor opportunity for title examination.

(c) Employing a construction of the Packers and Stockyards Act which, it is respectfully suggested, is contrary to its intent and purpose, the court below imposes a rule of liability on federally regulated market agencies engaged in the sale of livestock which does not, as a matter of settled law, exist in the case of other agencies whose business is affected by a public use, and this decisional regulation will unduly burden,

2. "Farm Income Situation." U. S. Dept. of Agriculture B.A.E. August-September 1947. Doc. L M S—7 dated October 3, 1947.

if not indeed obstruct, the free flow of interstate commerce.

(d) Movant is informed that there is presently pending in the State courts of Kansas, Colorado, Iowa, California, and in United States District Courts in Missouri and Kansas, a number of cases in which a question of law is presented substantially identical with that presented by the facts of the case at bar. The amounts in controversy are large and substantial. The decision of the Iowa Supreme Court in the instant case is at variance with the decision, on similar facts, of the Kansas City Court of Appeals of Missouri in the case of *Blackwell* v. *Laird, et al.*, 236 Mo. App. 1217, 163 S. W. (2d) 91. Liability, if any there is to be, of federally regulated "market agencies" rendering services to shippers in accordance with the mandate of the Packers and Stockyards Act, should not be made to depend on the local view of the individual State in which the interstate commerce is transacted. It was not the Congressional intent that the liability, if any, of a market agency located in Iowa and there engaged in the transaction of interstate commerce pursuant to the compulsions of the Act, should, on substantially identical facts, be different than the liability of a similar market agency located and similarly engaged in Missouri.

(e) Believing as it does: (1) that the decision of the Supreme Court of Iowa in the above entitled cause, imposes an unnecessary and unfair burden on a most vital area of the nation's interstate commerce and the federally regulated market agencies engaged therein; (2) will ultimately result in the promulgation of diverse State rules of law, and thus impair that uniformity of regulation which was intended by the Congress; and (3) overlooks or ignores the practical considerations inherent in the nature of the interstate commerce involved which operate to render the announced rule of law onerous and unfair, it respectfully moves the Court that it be granted permission to file the attached brief.

Application was made to the respective parties for their consent to the filing of the attached brief. Petitioner has consented. Respondent has declined its consent.

NATIONAL LIVE STOCK EXCHANGE,

By FRANCIS X. BUSCH,
Its Attorney.

Chicago, Illinois,

November 4, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 233.

RICE BROS., A PARTNERSHIP CONSISTING OF CHARLES R. RICE, WM. J. DOWNEY AND JOHN J. DONOHUE,
Petitioner,

vs.

E. H. BIRMINGHAM,
Respondent.

STATEMENT.

Respondent Birmingham was a dealer in livestock. He owned cattle in his possession in his pens in the Sioux City, Iowa, Stockyards (R. 11). Petitioner, Rice Bros., a co-partnership, bought and sold livestock on commission at the Sioux Falls Stockyards, Sioux Falls, S. D. It was duly registered and licensed by the Secretary of Agriculture to engage in such business, as a Market Agency, at said Stockyards (R. 35).

On a day certain, at the said Sioux City, Iowa Stockyards, Birmingham sold fifteen (15) head of cattle to a stranger. The latter gave the name of John Brainman. Birmingham accepted in payment and without any investigation, a check drawn by Brainman on a bank located at Sioux Falls, S. D. (R. 27). Birmingham caused the cattle to be deliv-

ered to Brainman on the same day. The latter then employed a trucker, and the cattle were transported, Brainman accompanying them, from Sioux City, Iowa, to the yards of the Sioux Falls Stock Yard Company at Sioux Falls, S. D. There they were ordered delivered by Brainman to the pens of the petitioner, Rice Bros. (R. 29, 31). The following day petitioner, Rice Bros., pursuant to direction sold the cattle for the account of Brainman and promptly accounted for and paid over the proceeds of sale to Brainman, before any notice had been received that Brainman had an imperfect title to the cattle (R. 33). For its service as Market Agency petitioner received $12.00 (R. 33). Several days later, Brainman's check, payable to Birmingham, was returned dishonored. There was no such person, nor any such account (R. 12).

On the theory that no legal title to the cattle had passed from Birmingham to Brainman, respondent Birmingham sued Rice Bros. for damages for conversion. The trial court found a verdict for Rice Bros., petitioner. The Iowa Supreme Court, dividing 5-4, has reversed and directed a judgment against Rice Bros. and in favor of the respondent Birmingham. Certiorari was denied October 13, 1947. Petitioner has applied to this Court for a rehearing.

ARGUMENT.

Where the nature of an agent's calling is such that he is required by law to serve all who apply he is not liable for a conversion innocently performed. It has long been a settled principle of the law of agency that where the nature of an agent's business or calling is such that he is required *by law* to serve *all* who may require his services or facilities, he is not liable, in the absence of notice, for a conversion of the property entrusted to and dealt with by him, though his principal be not the rightful owner. This is a settled *exception* to the general rule concerning the liability of agents who deal with chattels to which their principal may have no title. The most conspicuous example of the exception is the case of carriers. *Hall* v. *Cumberland Pipe Line Co.*, 193 Ky. 728, 733, 237 S. W. 405, 408; *Shellnut* v. *Central of Georgia R. R.*, 131 Ga. 404, 62 S. E. 294; *Nanson* v. *Jacobs*, 93 Mo. 331, 6 S. W. 246; *Johnson* v. *C. B. & Q. Ry.*, 70 Neb. 364, 97 N. W. 479, 482; *Moore*, Carriers (2d ed.), pp. 283-284. But the exception is not limited to carriers. Carriers have been merely the traditional illustration of the rule. The important circumstance is that the nature of the calling is one affected by public use. In a State where tobacco raising is a vital commerce the exception has been invoked in favor of public warehousemen selling tobacco for the producers thereof—a function identical with that of the petitioners herein. *Abernathy* v. *Wheeler*, 92 Ky. 320, 17 S. W. 858; *Fields* v. *Blane* (Ky.), 18 Ky. L. 675, 37 S. W. 850. It has been applied to warehousemen selling cotton—*Roanoke Banking Co.* v. *J. E. Dunson Bros. & Co.*, 30 Ga. App. 341, 117 S. E. 826. It was applied, anciently, to a "job teamster," because he was, in a small way,

a common carrier and could not legally refuse to transport property such as he usually carried. *Gurley* v. *Armstead* (1889), 148 Mass. 267, 268, 19 N. E. 389, 390. A companion exception is now, after much disagreement, equally well settled in the commerce of securities. In such commerce a broker, because he is regarded as a mere conduit between the seller and the purchaser, for which service he receives a small commission, and because he has little or no means of warning or inquiry, is not liable in conversion for the sale of securities though his principal have no title. See *Gruntal et al.* v. *National Surety Co.*, 254 N. Y. 468, 474, 173 N. E. 682, 684; *Restatement*, Agency, § 349-350 (g), p. 769. Distinguished writers in the field of Agency have urged that innocent agents should be protected, even where the thing sold is an ordinary chattel.*

In all such cases, the exception is bottomed upon two primary considerations. *First*, the public interest in obtaining an unobstructed flow of commerce through or by means of the conduits involved. *Second*, a recognition of the principle, that, to deprive such agents of the right to select with whom and at what rate they may deal, and at the same time require them to insure the honesty of the customers thrust upon them by the law, would not even approximate justice.

If there be anything that may be said to be settled for the purposes of the case at bar, it is that stockyards commission men, situated as is the petitioner, Rice Bros., in this case, are an integral part of the conduits through which pass the nation's great flow of interstate commerce in livestock. It was on that specific theory that the validity of the Packers and Stockyards Act was sustained in *Stafford* v. *Wallace*, 258 U. S. 495, 516. It was there further said

* "Conversion by Innocent Agencies," Prof. Walter W. Cook, 28 Yale Law Journal 175.

that such commission men were indispensable to the continuity of the current of such commerce. And it was further pointed out that sales made by livestock commission men, though creating a local change of title were *not* "merely local transactions." *Stafford* v. *Wallace*, 258 U. S. 495, 516. Livestock commission men, therefore, like carriers, warehousemen and securities brokers, are mere conduits. They do not purport to deal with the property in any but the most fleeting manner.

Laws enacted by the Congress pursuant to the Constitution become the supreme law of the land.

When the Congress, by its enactment of the Packers and Stockyards Act, declared it to be the law of the land, that commission men, being part of the conduits of the nation's interstate commerce in livestock, were engaged in a pursuit affected by a national interest, it thereby established the status of the commission man as such for the purposes of all courts, State and Federal.

And, in interpreting the Packers and Stockyards Act, it must be presumed that the Congress, when it enacted the Act, was familiar with the aforesaid exception to liability then long existing in the case of agency functions affected by a public use. It is a familiar principle of statutory construction that a legislature is presumed to have acted with full knowledge of judicial decisions under the pre-existing law. *Thompson* v. *United States*, 246 U. S. 547, 551; 59 C. J. § 600. From the circumstance, therefore, *that the Act nowhere declares the contrary*, by necessary implication, it must be concluded that the Congress contemplated and intended that in construing the Act and determining its effect upon both the rights of the public and the agencies, that the logical consequence of declaring livestock commission men to be agents engaged in a business affected by a public use, would be that the aforesaid well-established

exception would follow along with the Congressional declaration. That, so interpreted, the Act would be given effect in all proper cases and in *all* courts, State and Federal. This is the obvious interpretation to be placed on and intent to be attributed to, the statute. It is respectfully insisted that the only logical and practical construction to be placed upon the Packers and Stockyards Act is this: When the Congress deprived the livestock man of his right to select his own customer *it thereby similarly deprived the courts of the several States of the right, for purposes of their decisions therein, to treat him as if he were an agent who could select his own customer.* In effect, the Congress said to the commission man: "You are no longer free to select your own customers; you must serve indiscriminately all who apply." And it said to the several States: "You must henceforth, for the purposes of your decisions, treat him as a factor whose business is affected by a public use and regulated in the interest of the free flow of interstate commerce." The Congressional determination is as binding on the States as it is on the commission man.

It should have been so interpreted and applied by the court below in the case at bar. The Act cannot be interpreted, as it has by the court below, to mean that each state of the United States, is at liberty to say, if it likes, that such market agencies were deprived of their right (1) to select their own customers, (2) required to render services at rates fixed by the Secretary, and (3) to furnish security for the performance of their financial obligations, and *in addition,* become insurers of the good faith and honesty of the customers thrust upon them by the mandate of the law! Such an interpretation of the Act plainly deprives them of property without due process of law. Congress did not intend that either it or the States

should impose an unconstitutional burden upon commission men.

It has been suggested by Respondent (Rsp. Br. p. 6), that because Section 308 of the Act (7 U. S. C. § 209) imposes a liability on registered agencies for certain violations of the Act, provides further that such liability may be enforced either by complaint to the Secretary or by suit in federal courts, and that such actions should not abridge or alter remedies existing at common law, that an intent may be inferred on the part of Congress to negative the exception to liability first above referred to. This is erroneous. The particular section referred to relates *only* to the right to employ both common-law or statutory remedies *for violations of the Act.* That proposition was long ago settled by this court's interpretation of the Interstate Commerce Act, from which this particular section was borrowed. In the case of *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, where the identical clause was being construed, this court said (p. 446):

> "The clause is concerned *alone* with rights recognized in or duties imposed by the Act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the Act should be regarded as cumulative when other appropriate common-law or statutory remedies existed *for the redress of the particular grievance or wrong dealt with in the Act.*" (Italics ours.)

The rule of the majority opinion below imposes a practical and not a theoretical burden on the free flow of interstate commerce. Commission men located at stockyards are required to deal with cattle far removed from their point of shipment. In the case of a shipment of cattle from Texas to Kansas City or Chicago, by what means may a commission man, whose only implements of trade are "a horse on which he rides and a desk on which he keeps his

accounts,"* conduct an investigation into the title of the chattels sent to him? Must the free flow of those transactions which engender no suspicion be impeded, while, to avoid the financial consequences of the rule imposed by the Court below, the commission man is engaged in running down the identity, title and responsibility of every customer who ships cattle for sale? The financial responsibility involved in that interpretation of the Act which would require such commission men to insure the integrity of *all* persons sending cattle to them for sale, is by no means commensurate with the rate of commission permitted to them by the Secretary. Nothing was suggested in the court below as to what the petitioners in this case should have done when Brainman drove the fifteen (15) head of cattle into its yards at Sioux Falls, S. D., and then directed them to be sold for his account. On the other hand, respondent was not compelled to sell to a stranger without investigating the worth of the check handed in payment. The rule of law of the majority below rewards the negligent. Any regulation imposed by petitioner effective enough to have frustrated Brainman's scheme in this case would have to have been so thorough as to obstruct the very thing the Act was seeking to facilitate and be so complete as to make the regulation unreasonable.

If the free flow of livestock from farm to market is to continue unobstructed as the Congress intends, then we earnestly suggest that the rule of law appertaining to agents engaged in the sale of livestock should be the same as it is for carriers, warehousemen and for brokers engaged in the securities business. What sound reason can be suggested why a carrier, transporting cattle from a

* *Moorhead & Tagg Bros.* v. *U. S.*, 280 U. S. 420, 437.

railroad station in Texas to a stockyard in Chicago, should be relieved of liability, if its shipper be later discovered to be not the rightful owner, on the theory that it was a mere conduit and in the exercise of its public calling, but the commission man, far removed from the point of shipping origin, having no facilities for inquiry and by force of this court's decision equally a conduit, be liable? After livestock has been placed in the rapidly moving stream of interstate commerce, it should, at least for purposes of claims of the type asserted in the case at bar, be regarded as negotiable as the securities offered for sale in Wall or LaSalle Streets. Commission men in cases arising out of such circumstances as are present in the case at bar should have no other or different financial responsibility.

Federal regulation contemplated by the Act is so exclusive and so complete that in the interest of uniformity alone such regulation should not be obstructed or burdened by diverse local views. The policy of a statute which Congress has enacted under its constitutional power to regulate interstate commerce may not be defeated or obstructed by State law, whether decisional or statutory. *Philco Corp.* v. *Phillips Mfg. Co.*, 133 F. (2d) 663, 671; *Texas and Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Second Employers Liability Cases*, 223 U. S. 1, 53-55; *Postal Telegraph-Cable Co.* v. *Warren Godwin Co.*, 251 U. S. 27, 30.

Entirely apart from the proposition that the Congress, in the exercise of its constitutional power to regulate interstate commerce, has by its Act, now occupied the field to the exclusion of all but the most minor of State regulations, and it is therefore improper for a State to enter it either by decision or by statute, one of the primary purposes of the

Packers and Stockyards Act is the uniformity and centralization of regulation achieved thereby. It was said of the Act, when reported to the Congress, that it gave "the Secretary of Agriculture complete *inquisitorial, visitorial, supervisory* and *regulatory* power over the packers, stockyards and *all activities therewith;* that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the Interstate Commerce Act."* (Italics ours.) Such uniformity of regulation contemplated by the Act will be seriously endangered and as well the social aims sought to be thereby achieved frustrated, if the philosophy of construction on which the decision below depends is permitted to stand.**

It is respectfully submitted that the implications of the instant case are of such importance to the federal pattern

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* H. R. Rep. No. 77, to accompany H. R. 6320, 67th Cong., 1st Sess.

** Referring to the opinion of the Iowa Supreme Court (26 N. W. (2d) 39) in the case at bar, and to the opposing arguments considered therein it has been said: *Columbia Law Review, Vol. 47, July, 1947—No. 5*: "The choice between these arguments must be bottomed on considerations of social convenience. The legislative policy expressed in the Packers and Stockyards Act aimed to remove obstructions to the flow of commerce in the meat industry. To demand that the agent investigate the source of his principal's title in all cases, may impede materially the vast majority of transactions in which the title is unquestionably valid. Secondly, since the agent must serve all reasonable requests without discrimination, his freedom to investigate, while not destroyed, is inhibited by the fear that his examination of his principal's title may be characterized as discriminatory, leading to his suspension. Finally, the Act, by rendering the agent's fees subject to administrative regulation, makes it difficult for him to spread the risk of loss by increasing the price of his services. It would seem that the decision of the Iowa court in the instant case, while well buttressed by authority, fails to give adequate weight to the social aims which the Packers and Stockyards Act was intended to serve."

of regulation as to justify the granting of the writ of certiorari in the case at bar.

Respectfully submitted,

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